SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 303.

JAMES DOOLAN AND JAMES McCUE, PLAINTIFFS IN ERROR,

vs.

WILLIAM B. CARR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, APRIL 29, 1887.

1 *Complaint.*

In the Circuit Court of the United States, Ninth Circuit, in and for the District of California.

WILLIAM B. CARR, Plaintiff,

vs.

MICHAEL DOOLAN, JAMES DOOLAN, and JAMES McCUE, Defendants.

William B. Carr, plaintiff in the above-entitled action, complains of Michael Doolan, James Doolan, and James McCue, defendants herein, and, for cause of action, alleges that on the 1st day of June, A. D. 1882, he, this plaintiff, was the owner and seized in fee-simple and possessed of and entitled to the possession of that certain piece, parcel, and tract of land situate, lying, and being in the
2 county of Alameda and State of California, described as follows, to wit:

The east half of section twenty-seven (27), township two (2) south, range one (1) east, of the Mount Diablo base and meridian, of the public land surveys of the United States of America, in the State of California, containing three hundred and twenty acres, and from the date above mentioned until the present time has continued to be and now is the owner and entitled to the possession thereof; that afterwards, to wit, on the 16th day of October, A. D. 1882, and while this plaintiff was so the owner and possessed of and entitled to the possession of said land, the said defendants did, to wit, at said county of Alameda and State aforesaid, without right or title and against the will of this plaintiff, enter into and upon said land and premises, and did oust and eject this plaintiff therefrom, and ever since said day has wrongfully and unlawfully and against the will
3 of plaintiff withheld, and still do unlawfully withhold, possession thereof from this plaintiff to his damage in the sum of one thousand dollars.

And this plaintiff further alleges that the value of the use and occupation of said lands and premises monthly, from the date of defendants' said entry into and upon said lands and premises and while this plaintiff hath been and will be excluded therefrom, is the sum of one hundred dollars.

And the plaintiff further alleges that the value of said land exceeds five hundred dollars, and that said land is worth eight thousand dollars, and that his title to said land arises under the Constitution and laws of the United States of America, and that he, plaintiff, derives his title from a patent of the United States of America, and that the defendants deny the validity of said patent.

4 Wherefore plaintiff prays for judgment in his favor and against the defendants for the restitution and possession of said land and premises, and for the sum of one thousand dollars for the withholding thereof and for one hundred dollars per month from the date of said entry and ouster by defendants, the monthly value of the use and occupation thereof, and for costs of this action.

SHAFTER, PARKER & WATERMAN,
Att'ys for Plaintiff.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

William B. Carr, being duly sworn, deposes and says that he is the plaintiff in the foregoing action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on his information or belief, and as to those matters that he believes it to be true.

5 W. B. CARR.

Subscribed and sworn to before me this 31st day of October, 1882.

[SEAL.] J. H. BLOOD,
Notary Public in and for the City and County of San Francisco, State of California.

Endorsed: Filed November 10th, 1882. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

6 *Summons.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California.

WILLIAM B. CARR, Plaintiff,

vs.

MICHAEL DOOLAN, JAMES DOOLAN, and JAMES MCCUE, Defendants.

Action brought in the said circuit court and the complaint filed in the office of the clerk of said circuit court in the city and county of San Francisco.

The President of the United States of America to Michael Doolan, James Doolan, and James McCue, defendants, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the circuit court of the United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein (a certified copy of which accompanies this summons) in the office of the clerk of said court, in the city and county of San Francisco, within ten days after the service on you of this summons, if served in this county, or if served out of this county, then within thirty days, or judgment by default will be taken against you.

The said action is brought to recover from you the possession of that certain piece or parcel of land lying and being in the county of Alameda, State of California, being the east half of section twenty-seven, township two south, range one east, of the Mount Diablo base and meridian of the public land surveys of the United States of America, in the State of California, containing three hundred and twenty acres of land, together with the sum of one thousand dollars for the withholding thereof and one hundred dollars per month,

from the 16th day of October, 1882, the monthly value of the use of said land, and the costs of this action; and if you fail to appear and plead, answer or demur, as herein required, your default will be entered, and the plaintiff will apply to the court for the relief demanded in the complaint herein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 10th day of November, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the 107th.

[SEAL.] L. S. B. SAWYER, *Clerk.*

7 Endorsed.

UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 10 day of November, 1882, and personally served the same on the 15th day of November, 1882, by delivering to and leaving with Michael Doolan, James Doolan, and James McCue, said defendants named therein, personally, at the county of Alameda, in said district, a certified copy thereof, together with a copy of the bill of complaint certified to by L. S. B. Sawyer, clerk of the U. S. cir. c't, attached thereto.

San Francisco, 15th November, 1882.

M. M. DREW, *Marshal,*
By WM. G. PROCTOR, *Deputy.*

SHAFTER, PARKER & WATERMAN,
Plaintiff's Attorneys.

Filed November 16, 1882.

L. S. B. SAWYER, *Clerk,*
By J. F. O'BEIRNE, *Deputy Clerk.*

8 *Answer of James Doolan and James McCue.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

WILLIAM B. CARR, Plaintiff,

vs.

MICHAEL DOOLAN, JAMES DOOLAN, and JAMES MCCUE, Defendants.

Now come the defendants, James Doolan and James McCue, and for answer to the complaint herein they say, and each of them says, that as to the first cause of action declared therein, viz., the entry by defendants upon the tract of land therein described, and the ouster of plaintiff therefrom and the detention thereof by defendants, said complaint does not state facts sufficient to show
9 that this hon. court has jurisdiction of said cause of action, and does not state wherein or how said cause of action arises under the Constitution or laws of the United States; that as to the second course of action declared therein, viz., damages in the sum

of one thousand dollars, said complaint does not state facts sufficient to show that this hon. court has jurisdiction of said cause of action, and does not state wherein or how said cause of action arises under the Constitution or laws of the United States; that as to the third cause of action declared therein, viz., the sum of one hundred dollars per month from October 16th, 1882, for use and occupation of said tract of land, said complaint does not state facts sufficient to show that this hon. court has jurisdiction of said cause of action, and does not state that the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and does not state
10 wherein or how said cause of action arises under the Constitution or laws of the United States; that as to the combined or joint causes of action declared therein said complaint does not state facts sufficient to show that this hon. court has jurisdiction thereof, and does not show wherein or how said causes of action arise under the Constitution or laws of the United States.

For further answer to said complaint, defendants, James Doolan and James McCue, deny, and each of them denies, that the plaintiff was on the 1st day of June, 1882, or at any time prior or subsequent thereto, or at all, the owner, or seized in fee-simple, or possessed, or entitled to the possession of the land described in the complaint, or of any part thereof; and they deny, and each of them denies, that from the date above mentioned or from any date until the
11 present time, or at all, the plaintiff has continued to be, or now is, the owner or entitled to the possession of said land; and

They deny, and each of them denies, that on, to wit, the 16th day of October, A. D. 1882, or at any time while plaintiff was the owner, or possessed or entitled to the possession of said land the defendants, or either of them, did oust or eject plaintiff therefrom, or that they or either of them did, on said day or at any time, enter upon said land without right or title, or that they have or either of them has, ever since said day or ever since any time, wrongfully or unlawfully withheld or do now wrongfully or unlawfully withhold possession of said land from plaintiff; and they deny and each of them denies that they entered upon or have or claim any part of the land described in the complaint, except at the time, to the
12 extent, and in the manner hereinafter stated in this their answer.

They deny and each of them denies that the plaintiff has sustained damage in the sum of one thousand dollars or in any sum of money whatever by reason of any entry upon or detainer of the possession of the land described in the complaint; and

They deny and each of them denies that the value of the use and occupation of said land monthly from the date of defendants' alleged entry therein has been or is the sum of one hundred dollars, or any sum of money whatever; and they deny and each of them denies, on their information and belief, that the value of the use and occupation of said land will be one hundred dollars per month or any sum of money per month from the commencement of this action or from the present time until the trial of this action; and they

13 deny and each of them denies that the plaintiff's title to said land arises under the Constitution or laws of the United States, or that plaintiff derives his title from a patent of the United States; and they deny and each of them denies that plaintiff has now or has ever had any title whatever to any of said land or any part thereof.

For a further and separate answer to the complaint herein defendants, James Doolan and James McCue, aver and each of them avers that plaintiff's claim of title to and his claim of right to the possession of said land described in the complaint arise solely under a pretense that said land was granted to the Western Pacific Railroad Company under and by the act of Congress of the United States entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure
14 to the Government the use of the same for postal, military, and other purposes," approved July 1st, 1862, and the act of July 2d, 1864, amendatory thereof and supplemental thereto, and under a pretended patent claimed to have been issued by the officers of the Land Department of the United States under the pretended authority of the provisions of said acts of Congress; and these defendants aver and each of them avers that said half section of land or any part thereof was not granted under or by said acts of Congress to said Western Pacific Railroad Company, but, on the contrary, was reserved from the grant of lands made to said railroad company under and by the provisions of said acts of Congress.

That on, to wit, April 10th, A. D. 1839, the Mexican Government granted to Jose Noriêga and Robert Livermore a certain tract
15 of land known by the name "Las Pocitas," and which embraced all the land within the following boundaries, viz.: Bounded on the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don José Dolores Pachêco, containing in all two square leagues, provided that quantity be contained within the said boundaries, and if less than that quantity be found to be contained therein then that less quantity and all of said described tract of land; that the departmental assembly of the Mexican nation confirmed said grant to said Noriega and Livermore on, to wit, May 22d, 1840.

That on, to wit, February 27th, 1852, said Noriega and Livermore petitioned the board of land commissioners appointed under the provisions of the act of Congress, approved March 3d, 1851,
16 entitled "An act to ascertain and settle the private land claims in the State of California" to have said grant confirmed; and on, to wit, the 14th day of February, A. D. 1854, the said board of land commissioners confirmed the same to said Noriega and Livermore, their heirs and assigns; and the decree of confirmation so made of said Mexican grant by said board of land commissioners described the boundaries thereof to be: On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don Jose Dolores Pacheco, pro-

vided that within the same no greater quantity than two square leagues were found to be contained; and if a less quantity should be found therein, then that less quantity was confirmed and all of said described tract of land.

17 That the United States district court for the northern district of California on appeal to it from said decree of the board of land commissioners duly confirmed said Mexican grant on, to wit, February 18th, A. D. 1859, to the same extent and by the same description and under the same conditions as said board of land commissioners had done, and the Supreme Court of the United States, at the December term A. D. 1860, affirmed the said decree of said United States district court and every part thereof.

That during the year 1865 an official survey of the lands so confirmed to said Noriega and Livermore was made by or under the directions of the surveyor general of the United States for the State of California, and which was duly approved by said surveyor general in the year A. D. 1866, and which survey included the half section of land described in the complaint herein; that said survey was set aside by the Secretary

18 of the Interior in the year A. D. 1868, and a new survey ordered to be made of said Mexican grant within the boundaries set forth in said decrees, which should contain but two square leagues of land, or thereabouts.

That in March, 1869, the United States surveyor general for California caused the said Mexican grant — be surveyed and designated in accordance with the claims thereof, and within the boundaries set forth in said decrees of confirmation, the amount so segregated consisting of about two square leagues, in accordance with the said order of the Secretary of the Interior; and said survey was approved by said surveyor general on, to wit, May 11, 1870; and the said survey was approved by the Commissioner of the General Land Office on, to wit, March 1st, 1871; and said survey was finally approved by the Secretary of the Interior on, to wit, June 6th, A. D. 1871, and

19 on said last-named date the surplus (or sobrante) of the land embraced within the boundaries contained in said grant and in said decrees became freed and discharged from the claims and reservation of said Mexican grant and became public land of the United States and a part of the public domain thereof.

That the entire half section of land described in the complaint herein is located and embraced within the boundaries stated and tract described in and confirmed by the said decrees of the board of land commissioners of the United States district court, and of the Supreme Court of the United States, but was not included within the tract so surveyed in March, 1869, and finally approved on June 6th, A. D. 1871, as aforesaid, as the final survey of said Mexican grant, and said half section of land described in the complaint

20 herein was held and claimed as part and parcel of said Mexican grant, and was reserved as such continually from the 10th day of April, A. D. 1839, down to the 6th day of June, A. D. 1871; and on said last-named day it became for the first time public land of the United States.

That the land described in the complaint herein was duly surveyed by the United States and the plat of the township embracing the same filed in the United States land office of the proper district, viz., San Francisco, California, on the 10th day of June, 1865, and the same has ever since been and is now on file in said land office.

That the line of the road of said Western Pacific Railroad Company was definitely fixed under the provisions of said act of Congress on, to wit, the 30th day of January, A. D. 1865, through and along the locality on which the half section of land described in the complaint is situated, and the withdrawal of lands from
21 pre-emption, private entry, and sale through and along said locality for the benefit of said railroad company under the provisions of said act of Congress took place on, to wit, the 31st day of January, A. D. 1865, and said railroad was completed prior to the year A. D. 1876.

That the pretended patent under which alone plaintiff claims title and right to the possession of the land described in the complaint was issued by the officers of the United States land department without authority of law, and under a mistake of law, and the same is now, and has always been, null and void, and confers upon plaintiff no title or right to the possession of the land described in the complaint herein; and said land is now, and ever since said 6th day of June, A. D. 1871, has continuously been, public land of the United States.

22 For further answer defendant, James Doolan, avers that he is now, and has been for over one year last past, a citizen of the United States, over twenty-one years of age, and a single man and qualified to pre-empt a quarter section of public land; and on the — day of November, A. D. 1882, he made settlement in person on the northeast quarter of section twenty-seven, in township two south, range one east, Mount Diablo base and meridian, being the north half of the land described in the complaint, with the *bona fide* intention of pre-empting the same under the laws of the United States, and which quarter section contains one hundred and sixty (160) acres only, and at the time of said settlement this defendant (James Doolan) erected a dwelling-house on said quarter section of land, in which he has ever since resided and does now reside and make it his home; and ever since said
23 settlement this defendant has been and is now improving and cultivating said quarter section of land with the *bona fide* intention of pre-empting the same; that this defendant (James Doolan) was not at the time of said settlement, and has not since been, the owner of 320 acres of land or of any land whatever, and he did not quit or abandon any residence on his own land to reside on said quarter section of land, and he has never had or claimed any pre-emption right to any of the public lands of the United States except to said quarter section of land so settled on by him; and he did not settle on or improve said quarter section of land for the purpose of sale or for the benefit of any person other than himself, and he has not made any agreement or contract of any kind, directly or indirectly, with any person whatever by which the title he may

24 acquire to said quarter section of land from the United States shall inure in whole or in part to the benefit of any person other than himself; that said quarter section of land has not been since said 6th day of June, A. D. 1871, and is not now reserved from pre-emption by actual settlers; and it has never been and is not now within the limits of or selected as the site of any city or town, and does not contain any known salines or minerals; and it has never been proclaimed for sale or subject to private entry, and the same is agricultural land and is unenclosed and is unoccupied by any person other than this defendant; that said quarter section of land is within the district of lands subject to sale at the United States land office at San Francisco, California; that within thirty (30) days after this defendant (James Doolan)
25 settled on said quarter section of land he made and subscribed a declaratory statement of his intention to claim and pre-empt the same under the laws of the United States, and requested the register of said United States land office to file the same in that office, and tendered the legal fees therefor; but said register refused, through a mistake of law, and still refuses to file said declaratory statement, on the sole ground that said pretended patent for said land has been issued to the Central Pacific Railroad Company as the successsor in interest of said Western Pacific Railroad Company.

That said quarter section of land is now, and ever since said 6th day of June, 1871, has been, public land of the United States and subject to pre-emption by an actual and qualified pre-emption settler; and this defendant was, at the time of his said settle-
26 ment thereon and has ever since been and is now, a qualified person to pre-empt a quarter section of public land, and he has always been and is now ready and willing to pay the United States therfor and obtain the title thereto as such pre-emption settler.

For further answer defendant, James McCue, avers that he is now, and has been for over one year last past, a citizen of the United States, over twenty-one years of age, and a single man and qualified to pre-empt a quarter section of public land, and on the — day of November, A. D. 1882, he made settlement in person on the southeast quarter of section twenty-seven, in township two south, range one east, Mount Diablo base and meridian, being the south half of the land described in the complaint, with the *bona fide* intention of pre-empting the same under the laws of the United States, and which quarter section contains one hundred and sixty (160) acres
27 only; and at the time of said settlement this defendant (James McCue) erected a dwelling-house on said quarter section of land, in which he has ever since resided and does now reside and make it his home; and ever since said settlement this defendant has been and is now improving and cultivating said quarter section of land with the *bona fide* intention of pre-empting the same; that the defendant (James McCue) was not at the time of said settlement, and has not since been, the owner of 320 acres of land, or of any land whatever, and he did not quit or abandon any residence on his own land to reside on said quarter section of land,

and he has never had or claimed any pre-emption right to any of the public lands of the United States except to said quarter section of land so settled on by him; and he did not settle on or improve said quarter section of land
28 for the purpose of sale or for the benefit of any person other than himself, and he has not made any agreement or contract of any kind, directly or indirectly, with any person whatever by which the title he may acquire to said quarter section of land from the United States shall inure in whole or in part to the benefit of any person other than himself; that said quarter section of land has not been since said 6th day of June, A. D. 1871, and is not — reserved from pre-emption by actual settlers; and it has never been and is not — within the limits of or selected as the site of any city or town, and does not contain any known salines or minerals; and it has never been proclaimed for sale or subject to private entry, and the same is agricultural land and is unenclosed and is unoccupied by any person other than this defendant; that said quarter section of land is within the district of lands subject
29 to sale at the United States land office at San Francisco, California; that within thirty (30) days after this defendant (James McCue) settled on said quarter section of land he made and subscribed a declaratory statement of his intention to claim and pre-empt the same under the laws of the United States, and requested the register of said United States land office to file the same in that office, and tendered the legal fees therefor; but said register refused, through a mistake of law, and still refuses to file said declaratory statement, on the sole ground that said pretended patent for said land had been issued to the Central Pacific Railroad Company as successor in interest of said Western Pacific Railroad Company.

That said quarter section of land is now, and ever since said 6th day of June, 1871, has been, public land of the United States
30 and subject to pre-emption by an actual settler; and this defendant was, at the time of his said settlement thereon, and has ever since been and is now, a qualified person to pre-empt a quarter section of public land, and he has always been and is now ready and willing to pay the United States therefor and obtain the title thereto as such pre-emption settler.

Wherefore said defendants, James Doolan and James McCue, pray, and each of them prays, that the plaintiff take nothing by this action, and that they have judgment against plaintiff for their costs herein, and for such other and further relief as to this hon. court may seem meet and just.

MICH. MULLANY,
Attorney for Defendants, James Doolan and James McCue.

STATE OF CALIFORNIA, }
County of Alameda, } *ss:*

31 James Doolan and James McCue, being each duly sworn, each for himself on oath says that he is one of the defendants named in the foregoing answer and in the above-entitled action, and that he has heard the foregoing answer read and knows the

contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated as information or belief, and as to those matters he believes it to be true; and so say both of these defendants.

JAMES DOOLAN.
his
JAMES x McCUE.
mark.

Witness:
C. J. STEVENS.

Subscribed and sworn to before me this 18th day of December, A. D. 1882.

[SEAL.] C. J. STEVENS,
Notary Public.

I hereby certify and state that I have prepared and know the contents of the foregoing answer, and, in my opinion, it is well founded in point of law.

32 MICH. MULLANY,
Counsel for Defendants, James Doolan & James McCue.

Endorsed: Service of copy hereof admitted this 23d day of December, A. D. 1882, after filing this original. Shafter, Parker & Waterman, attorneys for plaintiff. Filed Dec'r 23d, 1882. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

33 *Disclaimer of Michael Doolan.*

In the Circuit Court of the United States, Ninth Circuit, in and for the State of California.

WILLIAM B. CARR, Plaintiff,
vs.
MICHAEL DOOLAN, JAMES DOOLAN, and JAMES McCUE, Defendants.

Now comes the defendant, Michael Doolan, and, for answer to the complaint herein, he denies that on October 16, A. D. 1882, or at any other time since said date he entered into or upon the land described in the complaint, and he denies that he was in the possession of said land or of any part of it after the time of the commencement of this action or at any time since, and he denies that he is now in the possession thereof or of any part thereof; and this defend-
34 ant, Michael Doolan, hereby disclaims any and all interest in and possession of and disclaims any and all right to the possession of the land described in the complaint and to every part thereof.

Wherefore this defendant prays to be dismissed from this action with judgment for his costs.

MICH. MULLANY,
Attorney for said Defendant, Mich. Doolan.

STATE OF CALIFORNIA, } ss:
County of Alameda, }

Michael Doolan, being sworn, on oath says that he is the person answering in and by the foregoing answer and one of the persons mentioned as defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and the same is true of his own knowledge.

MICHAEL DOOLAN.

35 Subscribed and sworn to before me this 18th day of December, A. D. 1882.

[SEAL.] C. J. STEVENS,
Notary Public.

I hereby certify and state that I have prepared and know the contents of the foregoing answer, and, in my opinion, it is well founded in point of law.

MICH. MULLANY,
Attorney and Counsel for Defendant.

Endorsed: Service of a copy hereof admitted this 23d day of December, 1882, after filing this original. Shafter, Parker & Waterman, attorneys for plaintiff. Filed Dec'r 23, 1882. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

36 *Verdict.*

U. S. Circuit Court, District of California.

WILLIAM B. CARR
v.
MICHAEL DOOLAN *et al.* } No. 2921.

We, the jury, find in favor of the plaintiff and against the defendant-, James Doolan and James McCue, and that said defendants were each severally in the wrongful possession of the land respectively described in their several answers and no others, and that the value of the rents and profits of the land so held and possessed by defendant, James Doolan, is the sum of seventy-five dollars, and the value of the rents and profits of the land so held and possessed by defendants, James McCue, is the sum of seventy-five dollars.

CROWSON SMITH, *Foreman.*

Endorsed: Filed January 3d, 1884. L. S. B. Sawyer, clerk.

37 *Judgment.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California.

WILLIAM B. CARR
vs.
MICHAEL DOOLAN *et al.* } No. 2921.

This cause having come on regularly for trial on the 2d day of January, 1884, being a day in the November, 1883, term of said court, before the court and a jury of twelve men duly impaneled, C. H. Parker and P. H. Waterman, Esqs., appearing on behalf of the plaintiff, and Michael Mullany, Esq., on behalf of the defendants, the trial having been proceeded with upon the 3d day of said January, and witnesses on the part of the plaintiff and
38 of the defendants having been sworn and examined, and the evidence being closed; the cause, after arguments of counsel and the instructions of the court, having been submitted to the jury, and the jury having subsequently rendered the following verdict: "We, the jury, find in favor of the plaintiff and against the defendants, James Doolan and James McCue, and that said defendants were each severally in the wrongful possession of the land respectively described in their several answers and no others, and that the value of the rents and profits of the lands so held and possessed by defendant, James Doolan, is the sum of seventy-five dollars and the value of the rents and profits of the land so held and possessed by defendant, James McCue, is the sum of seventy-five dollars;" and the court having ordered that
39 judgment be entered herein in accordance with said evidence and for costs.

Now, therefore, by virtue of the law and by reason of the premises, it is considered by the court that William B. Carr, plaintiff herein, do have and recover of and from the said defendant, James Doolan, the possession of that certain piece, parcel, and tract of land situate, lying, and being in the county of Alameda and State of California, described as follows, to wit: The northeast quarter of section twenty-seven, in township two south, range one east, Mount Diablo base and meridian, being the north half of the land described in the complaint herein, and the sum of seventy-five dollars, the value of the rents and profits of said land; and it is further considered by the court that William B. Carr, plaintiff herein, do have and recover of and from James McCue, defendant, the possession of that certain
40 piece, parcel, and tract of land situate, lying, and being in the county of Alameda and State of California, described as follows, to wit: The southeast quarter of section twenty-seven, in township two south, range one east, Mount Diablo base and meridian, being the south half of the land described in the complaint herein, and the sum of seventy-five dollars, the value of the rents and profits of said land; and it is further considered by the court that

said plaintiff recover from said defendants, James Doolan and James McCue, his costs in this behalf expended, taxed at one hundred twenty-eight $\frac{35}{100}$ dollars.

Judgment entered January 3, 1884.

L. S. B. SAWYER, *Clerk.*

I hereby certify that the foregoing is a full and correct copy of an original judgment entered in the above-entitled cause.

41 Attest my hand and the seal of said circuit court this 3d day of January, A. D. 1884.

[SEAL.] L. S. B. SAWYER, *Clerk.*

Filed January 3, 1884.

L. S. B. SAWYER, *Clerk.*

42 *Clerk's Certificate.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California.

WILLIAM B. CARR
vs.
MICHAEL DOOLAN *et al.* } No. 2921.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, within and for the district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the therein-entitled action.

Witness my hand and seal of said circuit court this 3d day of January, A. D. 1884.

[SEAL.] L. S. B. SAWYER, *Clerk,*
By F. D. MONCTON,
Deputy Clerk.

Endorsed: Judgment-roll. Filed January 3, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

43 *Bill of Exceptions.*

In the Circuit Court of the United States in and for the Ninth Circuit and District of California.

WILLIAM B. CARR, Plaintiff,

vs.

MICHAEL DOOLAN, JAMES DOOLAN, and JAMES MCCUE, Defendants.

Bill of exceptions by and on the part of defendants, James Doolan and James McCue.

This cause came on for trial before said court and a jury on the 3d day of January, A. D. 1884. Messrs. Shafter, Parker and Water-

man appeared as counsel for plaintiff, and Mich. Mullany appeared as counsel for said defendants, James Doolan and James McCue, and the following proceedings were had, viz:

44 The plaintiff offered in evidence a patent from the United States to the Central Pacific Railroad Company, which is in the following words and figures, viz:

"United States of America to all to whom these presents shall come, Greeting:

Whereas, by the act of Congress approved July 1st, 1862, as amended by the act of July 2d, 1864, to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, and of the act of March 3d, 1865, authority is given to the Western Pacific Railroad Company of California, a corporation existing under the laws of the State, to construct a railroad and telegraph line under certain conditions and stipulations as expressed in said acts, and provision is made for granting to the said company every alternate section of public
45 land designated by odd numbers to the amount of ten alternate sections per mile on each side of the said railroad on the line thereof and within the limits of twenty miles on each side of said road not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed; and whereas an official statement, bearing date February 1st, 1870, from the Secretary of the Interior has been filed in the General Land Office showing that the commissioner appointed by the President under the provisions of the sixth section of the said act of Congress approved July 2d, 1864, *have* reported to him that the line of railroad and telegraph of said company has been constructed and fully completed and equipped in the manner prescribed by the acts of
46 Congress relative to the Pacific railroad and telegraph line; and whereas, by articles of agreement entered into under the laws of the State of California between the said Western Pacific Railroad Company and the Central Pacific Railroad Company, said companies were amalgamated and consolidated under the name of Central Pacific Railroad Company upon the 22d day of June, 1870, as shown by a certified copy of the articles of consolidation filed with the Secretary of the Interior on the 28th day of September, 1870, by C. P. Huntington, vice-president of said Central Pacific Railroad Company; and whereas certain tracts of land have been selected by Charles J. Torbert, the deputy agent of the said Central Pacific Railroad Company, successors of the said Western Pacific Railroad Company, as shown by his original lists of selections, dated July 25, 1873, and January 7th, 1874, and certified under date of August 9, 1873, and January 7, 1874, by the registers
47 and receivers at Stockton and San Francisco, California, and the vice-president of the said Central Pacific railroad, successor of the Western Pacific Railroad Company, has applied for a conveyance of the title of said lands granted by the aforesaid acts

of Congress to the said Western Pacific Railroad Company, its associates, successors, and assigns, the said tracts being described as follows, to wit, the east half of section twenty-seven (27), township two (2) south, range one (1) east, of the Mount Diablo base and meridian, of the public land surveys of the United States, situated in the county of Alameda, State of California (here follows a description of other lands not in controversy in this action), now, know ye that the United States of America, in consideration of the premises, and pursuant to the said acts of Congress, have given
48 and granted, and by these presents do give and grant, unto the Central Pacific Railroad Company, successors as aforesaid, and to its successors, all the tracts of land described in the foregoing, yet excluding and excepting 'all mineral lands,' should any such be found, in the tracts aforesaid, but the exclusion and exception, according to the terms of the *terms of the* statute, shall not be construed to include 'coal and iron lands;' to have and to hold the said tracts, with the appurtenances thereof, unto the 'Central Pacific Railroad Company' and to its successors and assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this
49 twenty-eighth day of February, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-eighth.

By the President:

U. S. GRANT,
By S. D. WILLIAMSON, *Secretary.*

[Seal of General Land Office.]

L. N. LIPPINCOTT,
Recorder of the General Land Office."

The defendants, James Doolan and James McCue, by their counsel, and each of them objected to the admission in evidence of this patent on the grounds that it had not been shown that the land therein described and in dispute in this action was not reserved or disposed of by the United States at the time the line of the road of said Western Pacific Railroad Company was definitely fixed and it has not been shown that said land in dispute herein
50 was public land at the time the line of said railroad was definitely fixed or at any time whatever.

1st exception. The court overruled the objection, and the said defendants and each of them excepted; which exception was allowed and noted by the court, and said patent was read in evidence.

Plaintiff then offered in evidence a deed of conveyance from the Central Pacific Railroad Company to William B. Carr, which is in the following words and figures:

"Know all men by these presents that the Central Pacific Railroad Company (successor to 'The Central Pacific Railroad Company of California,' 'The Western Pacific Railroad Company,' and the California and Oregon Railroad Company, Consoli-

dated), in consideration of the sum of one ($1.00) dollar to
it paid by William B. Carr, of San Francisco city and
51 county, California, the receipt whereof is hereby acknowledged, hereby gives, grants, bargains, sells, and conveys to the said William B. Carr, his heirs and assigns, the following-described tracts of land, situate in Alameda county, State of California, according to the United States surveys, viz: The east half (½) of section twenty-seven (27), township two (2) south, range one (1) east, Mount Diablo base and meridian (and other lands), together with all the privileges and appurtenances thereunto appertaining and belonging, excepting and reserving, however, for railroad purposes a strip of land five hundred feet wide lying equally on each side of the track of the railroad of said company or any branch railroad now or hereafter constructed on said lands, and the right to use all
water needed for the operating and repairing of said rail-
52 roads, and subject, also, to the reservation and condition that the said purchaser, his heirs and assigns, shall erect and maintain good and sufficient fences on both sides of said strip or strips of land, and also reserving all claim of the United States to the same as mineral land:

To have and to hold the aforesaid premises to the said William B. Carr, his heirs and assigns, to his and their use and behoof forever.

In testimony whereof the said Central Pacific Railroad Company has caused these presents to be signed by its president and secretary and sealed with its corporate seal this tenth (10th) day of June, A. D. 1874.

[Corporate Seal of C. P. R. R. Co.]

LELAND STANFORD,
Pres't C. P. R. R. Co.
E. H. MILLER, Jr.,
Sec'y C. P. R. R. Co.

53 STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

On this tenth (10) day of June, in the year one thousand eight hundred and seventy-four (1874), before me, Charles J. Torbert, a notary public in and for said city and county of San Francisco, duly commissioned and qualified, personally appeared Leland Stanford, known to me to be the president, and E. H. Miller, Jr., known to me to be the secretary, of the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

In testimony whereof I have hereunto set my hand and affixed my official seal this tenth (10th) day of June, A. D. 1874.

[NOTARIAL SEAL.] CHARLES J. TORBERT,
Notary Public in and for the City and County of San Francisco."

54 The defendants objected to this deed as evidence on the grounds that it does not appear that the parties whose names purport to be signed to the same, viz., Leland Stanford and E. H.

Miller, had any authority or right to make a deed of conveyance of real estate on the part of or for the Central Pacific Railroad Company, and it has not been shown that the Central Pacific Railroad Company is or was at the date of said deed the successors in interest of the Central Pacific Railroad Company of California, or of the Western Pacific Railroad Company, or of the California and Oregon Railroad Company, Consolidated; and said defendants made the same objections to said deed also which they made to said patent.

2d exception. The court overruled the objections, and said
55 defendants and each of them excepted, which was noted and allowed by the court.

The plaintiff called a witness, who was sworn to testify as to the value of the use and occupation of the land in controversy per year; and said defendants objected to evidence as to such use and occupation per year on the grounds that the use and occupation per month was the only allegation of the complaint, and upon and to which allegation issue was made by the answer, and that there was no issue made by the pleadings as to the value of the use and occupation of said land by the year.

3d exception. The court overruled the objection, and the said defendants excepted, which exception was allowed by the court; and said witness testified that the value of the use and occupation of said land was the sum of $75 per each quarter section thereof from
56 the time of entry by said defendants thereon, as alleged in the complaint, until the time of trial, at yearly estimation.

Plaintiff then proved that the matter in dispute, viz., the half section of land described in the complaint, exceeds the sum or value of ten thousand one hundred dollars, and that each quarter of said half section of land exceeds the sum or value of five thousand and fifty dollars.

Thereupon plaintiff rested.

Defendants then moved that the action be ordered dismissed on the ground that it is not stated in, and does not appear from, the complaint or evidence adduced by plaintiff, or both combined, wherein or how either one or all of the causes of action stated in said complaint arises or arise under the Constitution or laws of the United States, and it is not stated in, and does not appear
57 from, said complaint or said evidence, or both, wherein or how this hon. court has jurisdiction of either one or all of said causes of action so stated in the complaint.

4th exception. The court denied the motion, and said defendants and each of them excepted, which was noted and allowed by the court.

Said defendants then moved and requested the court to instruct the jury to find and return a verdict for the defendants on the grounds, 1st, that there is no evidence or proof that the Central Pacific Railroad Company is, or has ever at any time become, the successor or assignee of the Western Pacific Railroad Company of California, or of any other railroad company, and, 2d, that the Central Pacific Railroad Company is not mentioned in the acts of Con-

gress mentioned in the form of patent which plaintiff has
58 put in evidence, and there is no evidence that the Central Pacific Railroad Company was in existence when said acts of Congress were passed, or at any time thereafter.

5th exception. The court denied the motion and request, and defendants and each of them excepted, which was noted and allowed by the court.

Thereupon, to maintain the issues on the part of defendants, and to establish that the form of patent under which plaintiff claims title to the lands in dispute is not a patent in law or in fact, and that the lands in dispute were not granted but were reserved from the grant of lands made to said Western Pacific Railroad Company under the provisions of the acts of Congress mentioned in said form of patent, and that the same conveyed no title and was issued without authority of law and is null and void,
59 defendants offer, and each of them offers, to prove, 1st, that on, to wit, April 10th, A. D. 1839, the Mexican government granted to José Noriêga and Robert Livermore a certain tract of land known by the name "Los Pocitas," and which embraced all the land within the following boundaries, viz: Bounded on the north by the Lomas de las Cuêvas, on the east by the Siêrra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don José Dolores Pacheco, containing in all two square leagues, provided that quantity be contained within the said boundaries; and if less that that quantity be found to be contained therein, then that less quantity and all of said described tract of land.

That the departmental assembly of the Mexican nation
60 confirmed said grant to said Noriega and Livermore on, to wit, May 22d, 1840.

2d. That on, to wit, February 27th, 1852, said Noriega and Livermore petitioned the board of land commissioners appointed under the provisions of the act of Congress, approved March 3d, 1851, entitled "An act to ascertain and settle the private land claims of the State of California," to have said grant confirmed, and on, to wit, the 14th day of February, A. D. 1854, the said board of land commissioners confirmed the same to said Noriega and Livermore, their heirs and assigns, and the decree of confirmation so made to said Mexican grant by said board of land commissioners described the boundaries thereof to be: On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don José Dolores Pacheco, provided that
61 within the same no greater quantity than two square leagues were found to be contained; and if a less quantity should be found therein, then that less quantity was confirmed and all of said described tract of land.

3d. That the United States district court for the northern district of California, on appeal to it from said decree of the board of land commissioners, duly confirmed said Mexican grant on, to wit, February 18th, A. D. 1859, to the same extent and by the same de-

scription and under the same condition as said board of land commissioners had done, and the Supreme Court of the United States, at the December term, A. D. 1860, affirmed the said decree of the United States district court and every part thereof.

4th. That during the year 1865 an official survey of the lands so confirmed to said Noriega and Livermore was made by or under the directions of the surveyor general of the United States
62 for the State of California, and which survey was duly approved by said surveyor general in the year A. D. 1866, and which survey included the half sections of land described in the complaint herein; that said survey was set aside by the Secretary of the Interior in the year A. D. 1868, and a new survey ordered to be made of said Mexican grant within the boundaries set forth in said decrees, which should contain but two square leagues of land or thereabouts.

5th. That in March, 1869, the United States surveyor general for California caused the said Mexican grant to be surveyed and designated in accordance with the claims thereof and within the boundaries set forth in said decrees of confirmation, the amount so segregated consisting of about two square leagues, in accordance with the said order of the Secretary of the Interior, and said
63 survey was approved by said surveyor general on, to wit, May 11th, 1870; and the said survey was approved by the Commissioner of the General Land Office on, to wit, March 1st, 1871; and said survey was finally approved by the Secretary of the Interior on, to wit, June 6th, 1871, and on said last-named date the surplus (or sobrante) of the land embraced within the boundaries contained in said grant and in said decrees became freed and discharged from the claims and reservation of said Mexican grant, and became public land of the United States and a part of the public domain thereof.

6th. That the entire half section of land described in the complaint herein is located and embraced within the boundaries stated and tract described in and confirmed by the said decree of the board of land commissioners of the United States district court and
64 of the Supreme Court of the United States, but it was not included within the tract so surveyed in March, 1869, and finally approved on June 6th, A. D., 1871, as aforesaid, as the final survey of said Mexican grant, and said half section of land described in the complaint herein was held and claimed as a part and parcel of said Mexican grant, and was reserved as such continually from the 10th day of April, A. D. 1839, down to the 6th day of June, A. D. 1871, and on said last-named day it became for the first time public land of the United States.

That the line of the road of said Western Pacific Railroad Company of California was definitely fixed under the provisions of said act of Congress on, to wit, the 30th day of January, 1865, under and within the intent and meaning of the provisions of the act of Congress of July 1st, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to
65 the Pacific Ocean," and the act amendatory thereof and

supplemental thereto; and that on the 31st day of January, 1865, the lands within the limits designated by said acts of Congress as being granted to said railroad company were withdrawn from pre-emption, private entry, and sale under the provisions of said acts, and that no part of the lands described in the complaint has been taken or used for any depot, shop, switch, turn-out — road-bed of said railroad or of said railroad company; that said railroad was completed prior to the year 1870.

And for the purpose of showing the right of defendants and of each of them to take up and keep the possession of the respective portions of the land described in the complaint taken and kept by them respectively, they offer, and each of them offers, to prove that the land described in the complaint herein was duly surveyed by
66 the United States and the plat of the township embracing the same filed in the United — land office of the proper district, viz., San Francisco, California, on the 10th day of June, 1865, and the same has ever since been and is now on file in said land office.

The defendant, James Doolan, is now and has been since, prior to the first day of December, 1881, a citizen of the United States, over 21 years of age, and a single man, and qualified to pre-empt a quarter section of public land, and on the 10th day of November, A. D. 1882, he made settlement in person on the northeast quarter of section twenty-seven, in township two south, range one east, Mount Diablo base and meridian, being the north half of the land described in the complaint, with the *bona fide* intention of pre-empting the same under the laws of the United States, and which quarter section contains one hundred and sixty (160) acres only, and
67 at the time of said settlement this defendant (James Doolan) erected a dwelling-house on said quarter section of land in which he has ever since resided and does now reside and make it his home, and ever since said settlement this defendant has been and is now improving and cultivating said quarter section of land with the *bona fide* intention of pre-empting the same.

That this defendant (James Doolan) was not at the time of said settlement and has not since been the owner of 320 acres of land or of any land whatever, and he did not quit or abandon any residence or his own land to reside on said quarter section of land, and he has never had or claimed any pre-emption right to any of the public lands of the United States except to said quarter section of land so settled on by him, and he did not settle on or improve said quarter section of land for the purpose of sale or for the ben-
68 efit of any person other than himself, and he has not made any agreement or contract of any kind, directly or indirectly, with any person whatever by which the title he may acquire to said quarter section of land from the United States shall inure in whole or in part to the benefit of any person other than himself.

That said quarter section of land has not been since said 6th day of June, A. D. 1871, and is not now reserved from pre-emption by actual settlers, and it has never been and is not now within the limits of or selected as the site of any city or town, and does not contain any known salines or minerals, and it has never been pro-

claimed for sale or subject to private entry; and the same is agricultural land and is unenclosed and is unoccupied by any person other than this defendant.

That said quarter section of land is within the district of
69 lands subject to sale at the United States land office at San Francisco, California; that within thirty days after this defendant (James Doolan) settled on said quarter section of land he made and subscribed a declaratory statement of his intention to claim and pre-empt the same under the laws of the United States, and requested the register of said United States land office to file the same in that office, and tendered the legal fee therefor, but said register refused, through a mistake of law, and still refuses, to file said declaratory statement on the sole ground that said pretended patent for said land has been issued to the Central Pacific Railroad Company, as the successor in interest of said Western Pacific Railroad Company.

That said quarter section of land is now, and ever since said 6th day of June, 1871, has been, public land of the United States, and subject to pre-emption by an actual and qualified pre-emption
70 settler, and this defendant was at the time of his said settlement thereon, and has ever since been and is now, a qualified person to pre-empt a quarter section of public land, and he has always been and is now ready and willing to pay the United States therefor and obtain the title thereto as such pre-emption settler.

That the defendant, James McCue, is now and has been since prior to the first day of December, 1881, a citizen of the United States, over twenty-one years of age, and a single man, and qualified to pre-empt a quarter section of public land; and on the 10th day of November, A. D. 1882, he made settlement in person on the southeast quarter of section twenty-seven, in township two south, range one east, Mount Diablo base and meridian, being the south half of the land described in the complaint, with the *bona fide* intention of pre-empting the same under the laws of the United States,
71 and which quarter section contains one hundred and sixty (160) acres only; and at the time of said settlement this defendant (James McCue) erected a dwelling-house on said quarter section of land, in which he has ever since resided and does now reside and make it his home, and ever since said settlement this defendant has been and is now improving and cultivating said quarter section of land with the *bona fide* intention of pre-empting the same; that this defendant (James McCue) was not at the time of said settlement and has not since been the owner of 320 acres of land, or of any land whatever, and he did not quit or abandon any residence on his own land to reside on said quarter section of land, and he has never had or claimed any pre-emption right to any of the public lands of the United States except to said quarter
72 section of land so settled on by him, and he did not settle on or improve said quarter-section of land for the purpose of sale or for the benefit of any person other than himself, and he has not made any agreement or contract of any kind, directly or indirectly, with any person whatever by which the title he may acquire

to said quarter section of land from the United States shall inure, in whole or in part, to the benefit of any person other than himself; that said quarter section of land has not been since said 6th day of June, A. D. 1871, and is not now, reserved from pre-emption by actual settlers, and it has never been and is not within the limits of or selected as the site of any city or town, and does not contain any known salines or minerals, and it has never been proclaimed for sale subject to private entry, and the same is agricultural
73 land, and is unenclosed and is unoccupied by any person other than this defendant; that said quarter section of land is within the district of lands subject to sale at the United States land office at San Francisco, California.

That within thirty days after this defendant (James McCue) settled on said quarter section of land he made and subscribed a declaratory statement of his intention to claim and pre-empt the same under the laws of the United States, and requested the register of said United States land office to file the same in that office, and tendered the legal fees therefor, but said register refused, through a mistake of law, and still refuses, to file said declaratory statement on the sole ground that said pretended patent for said land had been issued to the Central Pacific Railroad Company, as successor in interest of said Western Pacific Railroad Company.

74 That said quarter section of land is now, and ever since said 6th day of June, 1871, has been, public land of the United States and subject to pre-emption by an actual settler, and this defendant was at the time of his said settlement thereon, and has ever since been, and is now, a qualified person to pre-empt a quarter section of public land, and he has always been and is now ready and willing to pay the United States therefor and obtain the title thereto as such pre-emption settler.

The plaintiff objected to the proof thus ordered to be made by said defendants, and to every part thereof, on the ground that the same and every part thereof is irrelevant, incompetent, and immaterial, and for the reason that the defense made by the answer cannot be lawfully entertained by this court in this action;
75 that the answer of defendant Doolan does not state facts sufficient to constitute a defence to this action; that the answer of defendant McCue does not state facts sufficient to constitute a defence to this action; that the U. S. patent cannot be collaterally attacked in this action; that it can be attacked by bill in equity only; that the said U. S. patent and the recitals therein contained are conclusive evidence in this action that the legal title of the lands therein described was granted and transferred by the United States to the grantee named in said patent and, taken in connection with the deed from the railroad company to the plaintiff, is conclusive evidence of the plaintiff's right to recover.

6th exception. The court sustained the objection and refused to allow said proof, or any part thereof, to be made, and said
76 defendants and each of them excepted; which exception was allowed and noted by the court.

The court then charged the jury thus:

"GENTLEMEN OF THE JURY: It now becomes my duty to charge you as to the law applicable to this case. As you will have observed from the commencement of this case, the rulings of the court upon the evidence as offered on the part of the plaintiff in submitting the patent from the United States Government, the patent title to this land, to the Central Pacific Railroad Company, as indicated then by the court, have been that that patent is conclusive in this case. It cannot be attacked in a collateral manner. If it can be attacked at all it is only by a direct proceeding for the purpose of vacating the patent; and, without further remark upon this, one way or the other, it may be sufficient
77 to say that I charge you the law is that, so far as this case is concerned, the patent from the Government to the railroad company, the first patent introduced here, is conclusive of the rights of the parties in this case. Next after that was introduced in evidence on the part of the plaintiffs the deed conveying this land by the railroad company to the plaintiffs in this action, in whom title now rests. That deed, being sufficient, vested the title to this land in controversy in the plaintiff in this action, and the legal title is with him and draws with it the right of possession, and from the time he took that deed to the present moment, or till he disposes of it, he will be lawfully entitled to the possession of that land.

The issue of the United States patent is directed and controlled by law in all cases, whether to the railroad company or to
78 individuals, and certain officers of the Government are charged with the duty in a proper case, and after proper examination, of issuing these patents, and when once issued by these officers the presumption arises that they are justly and lawfully issued in all instances. It will suggest itself to your own mind what dreadful confusion might ensue if, in the millions of patents that have been issued by the Government during the last 30 or 40 years, they might each and every one be questioned and set aside because somebody had not done his duty. We hold that cannot be done"

(The court then charged the jury relative to the rents and profits of the land.)

7th exception. The defendants and each of them excepted to those portions of the instructions or charge of the court which tell the
79 jury that they are to accept this patent as conclusive of the title of the plaintiff, and also to that portion of the charge which says that the deed from the Central Pacific railroad to the plaintiff in this case conveyed the title and entitled him to recover.

The court noted and allowed said exceptions.

Thereupon the jury returned the following verdict, viz:

"We, the jury, find in favor of the plaintiff and against the defendants, James Doolan and James McCue, and that said defendants were each severally in the wrongful possession of the land, respectively, described in their several answers, and no other, and that the value of the rents and profits of the land so held and possessed by defendant James Doolan is the sum of seventy-five dollars, and the

value of the rents and profits of the land so held and possessed
80 by defendant James McCue is the sum of seventy-five dollars.

"CROWSON SMITH, *Foreman.*"

Said verdict was returned and filed on the 3d day of January, 1884, and judgment was entered thereon, as appears by the record.

The foregoing was all the evidence adduced, and all the evidence and proof offered, and all the proceedings which took place on the trial of said cause.

And the foregoing bill of exceptions is hereby certified, settled, and allowed as correct this 23d day of January, A. D. 1884, and within due time.

GEO. M. SABIN,
U. S. Dist. Judge of Nev., Holding Circuit Court for Dist. of Cal.

MICH. MULLANY,
81 *Of Counsel for Defendants, James Doolan and James McCue.*

Endorsed: Received a copy of the within bill of exceptions this 12th day of January, 1884. Shafter, Parker & Waterman, attorneys for plaintiff. Proposed bill of exceptions. Filed January 12, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, dep'y cl'k. Bill of exceptions. Filed January 23d, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

82 *Assignment of Errors.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

WILLIAM B. CARR, Plaintiff,
vs.
JAMES DOOLAN, JAMES MCCUE, *et al.*, Defendants.

Defendants, James Doolan and James McCue, assign and specify the following errors occurring at the trial of this action and excepted by them, viz:

1st. The court erred in overruling the objection made by said defendants to the admission in evidence of the form of patent purporting to have been issued by the United States to the Cen-
83 tral Pacific Railroad Company on the 28th day of February, A. D. 1874.

2d. The court erred in overruling the objection made by said defendants to the admission in evidence of the form of deed purporting to have been made by or in the name of the Central Pacific Railroad Company to William B. Carr on the 10th day of June, A. D. 1874.

3d. The court erred in denying the motion of said defendants to dismiss the action, because that this court has no jurisdiction of either one or all of the causes of action stated in the complaint.

4th. The court erred in refusing to direct the jury to return a verdict for said defendants, because there is no evidence that the Cen-

tral Pacific Railroad Company is or has become the successor or assignee of the Western Pacific Railroad Company, and the
84 Central Pacific Railroad Company is not mentioned in the acts of Congress under which said patent purports to have been issued, and there is no evidence that the Central Pacific Railroad Company is a corporation.

5th. The court erred in sustaining plaintiff's objections to the proofs offered by said defendants that the land in dispute and described in the complaint was held, claimed, and reserved as a part of the Mexican grant, Las Pocitas, from the 10th day of April, A. D. 1839, continually until the 6th day of June, A. D. 1871, and that the line of the road of the Western Pacific Railroad Company was definitely fixed on the 30th day of January, A. D. 1865, and that the lands which were granted to said company were withdrawn from pre-emption, private entry and sale, &c.,
85 on the 31st day of January, A. D. 1865, and the location and character of the land in dispute, and the qualifications, good faith, and rights of each of said defendants, and their object in entering into and settling upon the land in dispute, and the acts done by them after said settlement.

6th. The court erred in charging the jury that they should accept said patent as conclusive that the title to the land in dispute was thereby conveyed to the Central Pacific Railroad Company, and that said deed from said company to the plaintiff conveyed the title to him and entitles him to recover herein.

Said defendants present the foregoing errors and assign the same, and pray that the judgment herein be reversed.

MICH. MULLANY,
Attorney for said Defendants, James Doolan & James McCue.

86 Endorsed: Service of a copy hereof admitted this 26th day of January, A. D. 1884. Shafter, Parker & Waterman, attorneys for plaintiff. Filed January 26, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

87 *Bond on Writ of Error.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

JAMES DOOLAN and JAMES MCCUE, Plaintiff- in Error,
vs.
WILLIAM B. CARR, Defendant in Error. } No. 2921.

Know all men by these presents that we, Francis Floyd and Michael Doolan are held and firmly bound unto William B. Carr, said defendant in error, in the sum of ten hundred dollars, lawful money of the United States of America, to be paid to the said William B. Carr, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and
88 administrators, firmly by these presents.

Sealed with our seals, dated this 28th day of January, A. D. 1884.

Whereas the above-named James Doolan and James McCue have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the action entitled "William B. Carr, plaintiff, *vs.* James Doolan *et al.*, defendants (No. 2921), by the circuit court of the United States, ninth circuit, in and for the district of California:

Now, therefore, the condition of this obligation is such that if said James Doolan and James McCue shall prosecute their said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

his
FRANCIS x FLOYD.
mark.
MICHAEL DOOLAN.

Witness to mark of Francis Floyd:
WM. GRANT.

Acknowledged, signed, sealed, and delivered in presence of—
L. S. B. SAWYER,
Com'r U. S. Cir't Court, Dist. Cal.

89 UNITED STATES OF AMERICA, *District of California,* } ss:

Francis Floyd and Michael Doolan, being duly sworn, each for himself deposes and says that he is a resident and householder in said district and is worth the sum of ten hundred dollars, lawful money of the United States of America, over and above all his just debts and liabilities and exclusive of property exempt from execution.

his
FRANCIS x FLOYD.
mark.
MICHAEL DOOLAN.

Witness to mark of Francis Floyd:
WM. GRANT.

Subscribed and sworn to before me this 28th day of January, A. D. 1884.

L. S. B. SAWYER,
Com'r U. S. Cir't Court, Dist. of Cal.

Endorsed: The form and the amount of the within bond and the sufficiency of the sureties therein are hereby approved. Geo.
90 M. Sabin, acting as circuit judge, 9th circuit. Filed January 28, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

91 In the Circuit Court of the United States for the District of California.

WILLIAM B. CARR
vs.
MICHAEL DOOLAN *et al.* } No. 2921.

I, L. S. B. Sawyer, clerk of the circuit court of the United States, of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing ninety written pages, numbered from 1 to 90, inclusive, are a full, true, and correct copy of the record and of all proceedings in the above and therein-entitled cause, and that the same together constitute the return to the annexed writ of error.

Witness my hand and seal of said circuit court this 11th day of August, A. D. 1884.

[The Seal of the Circuit Court, District of Cala.]

L. S. B. SAWYER, *Clerk.*

92 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of the ninth judicial circuit, district of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between James Doolan and James McCue, plaintiffs in error, and William B. Carr, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 28th day of January, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and eighth.

[The Seal of the Circuit Court, District of Cala.]

L. S. B. SAWYER,
Clerk U. S. Cir't Court, Dist. Cal.

The above writ of error is hereby allowed.

GEO. M. SABIN,
Dist. Judge Nev., Acting Circuit Judge.

93 [Endorsed:] United States Supreme Court. James Doolan & *al.*, pl'ffs in error, *vs.* Wm. B. Carr, def't in error. Writ of error. Filed January 28, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

Received a copy of the within writ of error, and service of the same is hereby admitted this 28th day of January, 1884.

SHAFTER, PARKER & WATERMAN,
Attorneys for Defendant in Error, Wm. B. Carr.

The Answer of the Judges of the Circuit Court of the United States for the District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[The Seal of the Circuit Court, District of Cala.]

L. S. B. SAWYER, *Clerk.*

94 UNITED STATES OF AMERICA, *ss:*

To William B. Carr, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1884, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, wherein James Doolan and James McCue are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable George W. Sabin, judge of the district court of the U. S. for the district of Nevada, holding circuit court of the United States for the ninth circuit, district of California, this 28th day of January, A. D. 1884, and of the Independence of the United States the one hundred and eighth.

[The Seal of the Circuit Court, District of Cal'a.]

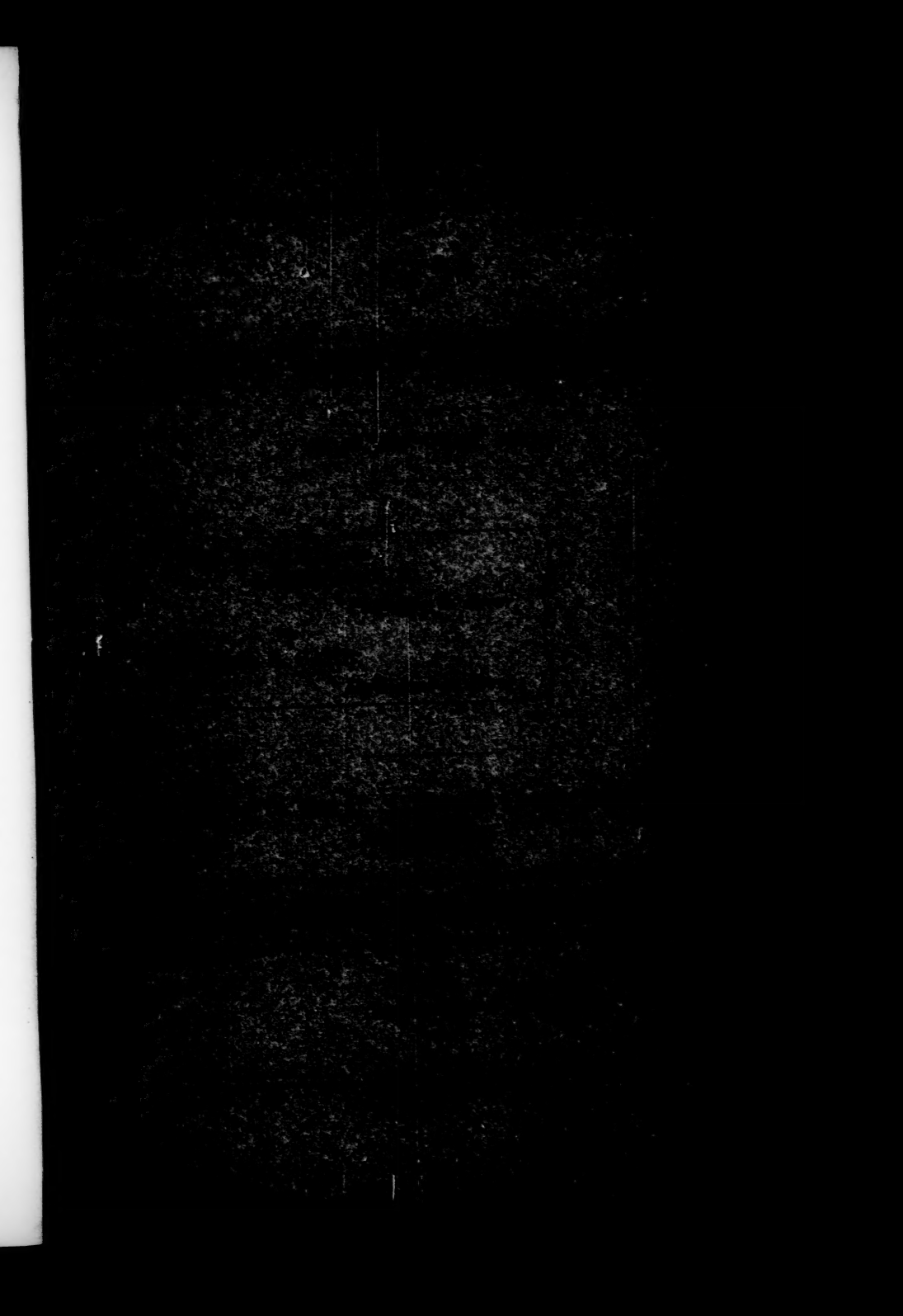
GEO. M. SABIN,
District Judge for the District of Nevada, holding Circuit Court for the District of California.

95 [Endorsed:] United States Supreme Court. James Doolan *et al.*, pl'ffs in error, *vs.* Wm. B. Carr, def't in error. Citation. Filed January 28, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

Service of the within citation, by receipt of a copy thereof, admitted this 28th day of January, A. D. 1884.

SHAFTER, PARKER & WATERMAN,
Attorneys for Defendant in Error, Wm. B. Carr.

Endorsed on cover: California C. C. U. S. No. 303. James Doolan & James McCue, plaintiffs in error, *vs.* William B. Carr. Filed 18th September, 1884.



IN THE

Supreme Court of the United States.

JAMES DOOLAN AND
JAMES McCUE,
Plaintiffs in Error,

vs.

WILLIAM B. CARR,
Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

Error to the U. S. Circuit Court, District of California.

Action by plaintiff (who is defendant in error) to recover possession of a certain half section, (320 acres) of land in Alameda county, California, from the defendants (plaintiffs in error) with $1,000 damages, and $100 per *month* for use and occupation of the land, and costs. And plaintiff seeks to recover solely on the strength of his alleged *title* to the land sued for.

The sole ground upon which the action was brought in the Federal court, and upon which the jurisdiction of the Federal court is claimed, is stated in the complaint thus: "And the plaintiff further alleges that the value of said "land exceeds five hundred dollars, and that said land is "worth eight thousand dollars, and that his title to said "land arises under the Constitution and Laws of the United "States of America; and that he, plaintiff, derives his title

" from a patent of the United States of America, and that " the defendants deny the validity of said patent." (Rec. fol. 3.)

Defendants, (who are plaintiffs in error), answered:

1st. That the U. S. Circuit Court has no jurisdiction of the action, either as to the land itself, or the damages claimed for the entry thereon, or for the use and occupation thereof. (Rec. fols. 9 and 10).

2d. That plaintiff does not own and has never owned the land sued for, and he has not, and has never had any title thereto; and that his title thereto does not arise under the Constitution or Laws of the United States; and as a consequence, that the defendants never entered upon the land while the plaintiff was the owner thereof, and that plaintiff has not suffered any damage by reason of the entry, and that the use and occupation of the land is worth nothing by the *month*, as alleged. (Rec. fols. 10, 11, 12 and 13).

3d. A statement of certain facts from which the legal conclusion follows, that plaintiff has not, and never had, any title to the land sued for; and a further statement of facts showing that defendants are and have always been rightfully and lawfully in possession of the land sued for. (Rec. 13 to 30 inclusive).

On the trial, the plaintiff put in evidence a patent to the Central Pacific Railroad Co., as the alleged successor in interest of the Western Pacific Railroad Co., which purports to have been issued under the Pacific Railroad Acts, so called, of July 1, 1862, and July 2, 1864, and a deed of conveyance from the Central Pacific Railroad Co. to himself, both of which instruments contain a description of the land sued for. He then gave evidence of the use and occupation of the land by the year, and rested. (Rec. fols. 44 to 56 inclusive).

Defendants objected to this evidence, *seriatim*, as it was offered; the Court overruled the objections, and the defendants excepted to the rulings. (Rec. fols. 50, 54 and 55).

Defendants then moved that the action be ordered dismissed for want of jurisdiction, "on the ground that it is "not stated in, and does not appear from the complaint or "evidence adduced by plaintiff, or both combined, wherein "or how either one or all of the causes of action stated in "said complaint arises or arise under the Constitution or "Laws of the United States; and it is not stated in, and "does not appear from said complaint or said evidence, or "both, wherein or how this Hon. Court has jurisdiction of "either one or all of said causes of action so stated in the "complaint."

The court denied this motion, and an exception to the ruling was taken and allowed. (Rec. fol. 57).

Defendants then requested that the court charge the jury to find for them. This request was denied, and an exception taken and allowed to the ruling. (Rec. fol. 57–8.)

"Thereupon, to maintain the issues on the part of defen-"dants, and to establish that the form of patent under "which plaintiff claims title to the lands in dispute is not "a patent in law or in fact, and that the land in dispute was "not granted, but was *reserved* from the grant of lands made "to said Western Pacific Railroad Company under the pro-"visions of the Acts of Congress mentioned in said form "of patent, and that the same conveyed no title, and was "issued *without authority of law*, and is null and void," defendants, and each of them, offered to prove the facts set up in their answer, which are briefly stated thus:

1st. That on April 10th, 1839, the Mexican government granted to Jose Noriega and Robert Livermore a certain tract of land known by the name of Las Pocitas, and which embraced all the land within the following boundaries, viz.: bounded on the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San Jose, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, provided that quantity be contained within the said boundaries; and if less than that quantity be found to be contained therein, then that less quantity, and all of said described tract of land.

2d. That the Departmental Assembly of the Mexican Government confirmed said grant on May 22d, 1840.

3d. That said Noriega and Livermore presented a petition, on Feb'y 27, 1852, to the Board of Land Commissioners, appointed under the Act of Congress of March 3d, 1851, entitled, "An act to ascertain and settle private land claims in the State of California," to have said grant confirmed; and on Feb'y 14, 1854, said board confirmed said grant, and in the decree of confirmation, described the boundaries thereof thus: "On the north by the Lomas de "las Cuevas, on the east by the Sierra de Buenos Ayres, on "the south by the dividing line of the establishment of San "Jose, and on the west by the rancho of Don Jose Dolores "Pacheco, provided that within the same no greater quan- "tity than two square leagues were found to be contained; "and if a less quantity should be found therein, then that "less quantity was confirmed and all of said described tract "of land."

4th. That the U. S. district court for the northern district of California, on petition for review or appeal to it, confirmed said grant on Feb'y 18th, 1859, to the same extent, and by the same description, and under the same condition as the Board of Land Commissioners had done. And during the December term of 1860, the U. S. Supreme Court affirmed the decree of the U. S. District Court.

5th. That during the year 1865, an official survey of this grant was made by the U. S. Surveyor General for California, and which survey was approved by said Surveyor General in 1866.

That said survey included the half section of land in controversy.

That said survey was taken before the Secretary of the Interior and by him set aside in 1868; "and a new survey "ordered to be made of said Mexican grant *within the* "*boundaries set forth in said decrees*, which should contain "but two square leagues or thereabouts."

6th. That the new survey thus ordered was made by the U. S. Surveyor General in 1869, within said boundaries set forth in said decrees, and which contained about two square leagues; and said survey was approved by said Surveyor-General on May 11, 1870, and by the Commissioner of the General Land Office on March 1, 1871, and by the Secretary of the Interior on June 6, 1871. And that "on said "last named date the surplus (or sobrante) of the lands em- "braced within the boundaries contained in said grant and "in said decrees became freed and discharged from the "claims and reservation of said grant, and became public "land of the United States, and a part of the public do- "main thereof."

7th. That the entire half section of land sued for herein is located and embraced within the boundaries and tract described in and confirmed by said decrees of the Board of Land Commissioners, and U. S. District Court and Supreme Court of the U. S., and also within the survey of said grant made in 1865, and approved in 1866; but was not included in the final survey, which was finally approved on June 6, 1871; and that said half section of land described in the complaint "was held and claimed as a part and parcel of "of said Mexican grant, and was reserved as such contin- "ually from the 10th day of April, A. D. 1839, down to the "6th day of June, A. D. 1871, and on said last named day "it became for the first time public land of the United "States."

8th. That the line of the road of the Western Pacific R. R. Co. of California was definitely fixed under the provisions of said Act of Congress, on the 30th day of January, 1865, under and within the intent and meaning of the provisions of the Act of Congress of July 1, 1862, entitled, "An "Act to aid in the construction of a railroad and telegraph "line from the Missouri river to the Pacific ocean," and the act amendatory thereof and supplemental thereto; and that on the 31st day of January, 1865, the lands within the limits designated by said Acts of Congress, as being

granted to said railroad company, were withdrawn from pre-emption, private entry and sale, under the provisions of said acts: and that the road of said railroad company was completed prior to the year, 1870.

9th. For the purpose of showing the right of defendants, and of each of them, to enter upon and keep possession of the land sued for, they offered to prove their respective qualifications as preëmption settlers, in detail, and their entry as such settlers on November 10th, 1882, and the facts in detail showing compliance with the laws in that behalf, and their attempts to prove up and pay for their respective portions of said land, and to obtain title therefor as such preëmption settlers; and the refusal of the officers of the local U. S. Land Office, through a mistake of law, to permit them to proceed in obtaining title for said land "on the sole "ground that said pretended patent for said land has been "issued to the Central Pacific Railroad Company."

The plaintiff objected to the proof thus offered, on the ground that the patent put in evidence by him is conclusive evidence that the legal title for the land in controversy passed thereby, *i. e.*, that the *validity thereof cannot be denied or questioned in this action by defendants.* The Court sustained the objection, and the defendants, and each of them excepted, and their exception was allowed and noted.

Following the same rule, the Court charged the jury to find for the plaintiff, and the defendants excepted, and their exception was allowed.

A verdict for the plaintiffs followed, for the possession of the land sued for, and for $75 for rents and profits from each of the defendants.

The proceedings thus briefly stated appear on pages 18 to 23 of the Record.

The assignment of errors made by defendants presents in detail all the errors which they claim occurred at the trial, but these detailed errors are in substance, resolvable into two, viz.:

I.

The record shows affirmatively that the U. S. Circuit Court has no jurisdiction of this action, or of the parties thereto, or the subject matter thereof.

The only ground upon which jurisdiction is claimed is, that the plaintiff claims title under a patent of the U. S. issued to his grantor, and that the defendants deny the validity of that patent. On the trial, the defendants were not permitted to deny or question the validity of this patent; and it was for the benefit of that ruling, and not because of any federal question, as we shall hereafter shew, that plaintiff brought his action in the U. S. Circuit Court, instead of the State Court.

In short, if plaintiff had stated himself correctly and at length, the ground on which he invoked the jurisdiction of of the Federal Court would be thus stated: Plaintiff derives title from a patent of the U. S., and defendants deny the validity of said patent; and, in the State Courts, defendants would be permitted to prove that plaintiff has no title, and that the patent is void; but this (U. S. Circuit) Court will not permit them to deny the validity of this patent, and although plaintiff has no title to the land sued for, he will secure the full benefit of a title, nevertheless, through the rule of evidence prevailing in this Court. Hence, plaintiff prefers to bring his action in this Court, and not in the State Court.

It is provided "That the Circuit Courts of the United "States shall have original cognizance concurrent with the "Courts of several States, of all suits of a civil nature "* * arising under the Constitution and Laws of the "United States." * *

18 U. S. Stat. at Large, 470.

Stripped of verbiage, the allegation made to secure cognizance of the U. S. Circuit Court is that, "plaintiff "derives his title from a patent of the United States of "America, and that the defendants deny the validity of said

"patent." The previous allegation that plaintiff's title "arises under the Constitution and Laws of the United "States," is merged in the allegation as to the patent. Then, does the allegation thus made give jurisdiction to the Circuit Court? We submit that it does not. There are no facts stated to show that plaintiff's title arises under the Constitution; neither does he state any fact showing that his title arises under the Laws of the United States. To state that he claims title under a U. S. patent, and that defendants deny the validity thereof, states no case of jurisdiction for the Circuit Court. Nearly all the titles in the country are derived under U. S. patents; and that the validity of such patents may be denied by rival claimants to the land, presents no element to secure cognizance of the Circuit Court.

As will be observed, it is not stated why, or upon what ground, or for what cause, defendants deny the validity of this patent; and in the absence of such statement the complaint fails to show jurisdiction of the United States Circuit Court.

But, if jurisdiction can be conferred by conjecture, let us suppose the allegation to be that defendants deny the validity of this patent because they claim it is a forgery. Would this confer jurisdiction? We submit that it would not. Or, suppose the allegation to be that defendants deny the validity of said patent, because they claim it was issued for land which was reserved and was issued without authority of law. Would this confer jurisdiction? We submit that it would not. Or, suppose the allegation to be that defendants deny the validity of said patent because they claim it was issued for land fifty miles away from the line of the railroad, or for an even-numbered section. Would this confer jurisdiction? We submit that it would not. We might multiply instances of a similar kind, but shall forbear.

A suit brought to recover the possession of land described in a patent, whether its validity is alleged to be denied or not, does not arise under the laws, much less under the Con-

stitution of the United States. The allegation in this behalf, of the complaint at bar, is a singular and indefinite one, and if it is permitted to bring the suit within the cognizance of the Federal Courts, we feel safe in anticipating a much larger docket of undecided cases before this Court, within a few years, than there is at present.

Wherein or how does this suit arise under the Constitution or the Laws of the United States? There is nothing to be found in the record to show that it does; on the contrary, it appears from the record (as was anticipated by the plaintiff) that the defendants were not permitted to deny the validity of this patent. So that, by anticipation, plaintiff's jurisdictional allegation is, that he claims title under a patent of the United States, and no more. This is insufficient.

In the words of this Court: "Before, therefore, a Circuit "Court can be required to retain a cause under this juris- "diction (Act of 1875), it must in some form appear upon "the record, by a *statement of facts* in legal and logical form, "such as is required in good pleading (1 Chit. Pl. 213), "that the suit is one which really and substantially involves "a dispute or controversy, as to a right which depends "upon the construction or effect of the Constitution, or "some law or treaty of the United States."

Gold Co. vs *Keyes*, 6 *Otto R.* 199.

To the same effect are

Romie vs. *Casanova*, 91 *U. S. R.* 380.
Hoadley vs. *San Francisco*, 94 *U. S. R.* 4.

Unless there is some contest as to the construction of the Act of Congress, there is no jurisdictional question in the case. And the pleading (or the petition for removal to the Circuit court,) must state the *facts* showing that there is a contest as to the construction of the Act of Congress. It is the duty of the parties to state the facts, and of the court to deduce the conclusions of law therefrom. (6 Otto R. 199.)

"The allegation in the complaint that the cause of action "arises under the laws of the United States, and necessarily "involves the construction of certain Acts of Congress, is "only a conclusion of law. Unless the facts stated show "how it arises under such laws, the allegation is insufficient "to confer jurisdiction by reason of the character of the "cause without reference to that of the parties."

Dowell vs. *Griswold*, 5 *Sawy. U. S. Circt. Ct. Rep.* 40-1.
Trafton vs. *Nougues*, 4 *id.* 179.

In the case at bar, no facts whatever are stated to show that this suit arises under the laws of the United States, or that there is any contest as to the construction of any such. Indeed, to make any such allegation would be contrary to the plaintiff's design.

We submit that the suit has not been brought within the jurisdiction of the Circuit court, and should be dealt with accordingly, *i. e.*, ordered dismissed.

Provident Sav. Bk. vs. *Ford*, 114 *U. S. Rep.* 635.
Theurkauf vs. *Ireland*, 27 *Fed. Rep.* 769.

II.

The proof offered by defendants that the land in controversy was reserved, held and claimed as a part of a valid Mexican grant from 1839 *to June* 6*th*, 1871; *and, that the line of the road of the Western Pacific R. R. Co. of Cal., was definitely fixed on January* 30*th*, 1865, *etc., ought to have been admitted, and it was error to reject it.*

Plaintiff has no title to the land sued for; the patent presented by him is void—it is not merely erroneous or voidable, but it is a *nullity*. It is so decided and settled by this Court in

Newhall vs. *Sanger*, 92 *U. S. Rep.* 629;
recognised and affirmed in
Kans. Pac. R. R. Co. vs. *Dunmeyer*, 113 *U. S. Rep.* 642.

It may be added that in the case at bar, the Mexican grant, under which the land in controversy was held, claimed and reserved, was a *valid* grant, while the grant involved in *Newhall* vs. *Sanger* was an *invalid* grant, or, to escape a contradiction of terms, it was not a grant.

Plaintiff's position is, then, necessarily thus: He seeks to recover possession of this land solely by virtue of an alleged *title;* defendants deny that plaintiff has any title, and set up facts and offer to prove them, sustaining that denial, which conclusively show that plaintiff has no title. Plaintff objects to evidence disproving his title, and in the face of the offered proof admits that he has no title, that his patent was issued without authority of law, and for reserved land, and is *void*; but because he managed to secure its issue, defendants must not be allowed to show that it is void, or that he has no title—that although the offered proof shows conclusively that he has no title, yet, the rules of evidence are so singular and senseless that he must, nevertheless, obtain, through the *truth-seeking* machine of a court of *justice*, all the benefits of a title, although he has no title at all.

I deny that any such absurd consequences are sanctioned by *law* or by a court of *justice*. The plaintiff alleged that he was *entitled* of this land; defendants denied that allegation, and set up the facts in their answer, which made good their denial. It would have been, indeed, a mock movement to have summoned defendants to answer the allegations of plaintiff's complaint, if they were not allowed the right or privilege of denying these allegations by their answer, if they should be denied the right or privilege of proving their denial thus set up in their answer.

The words of the statute under which the railroad lands were granted, are:

"That there be, and is hereby, granted to the said company * * * every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad * * * not sold, reserved or otherwise disposed of by the United States, and to which a preëmption or homestead claim may

not have attached, at the time the line of said road is definitely fixed."

The act had the effect of vesting in the company the title of the lands granted at the instant that the line of the road was definitely fixed. Lands which would have passed by the grant, under the terms of the Act at the time of its date, were subject to be withdrawn from its effect before the line of the road was definitely fixed; but the company could neither lose nor gain by the conditions which lands might assume or be subjected to, *after* the line of the road was definitely fixed. Any land that was at that moment public land, within the designated distance of the road, and not sold, reserved, etc., became vested in the company. On the other hand, no land that was then sold, reserved, or otherwise disposed of, at the time the line of the road was definitely fixed, did pass to the company. The Act does not mean that the company should have the right to wait until lands, which were reserved when the line of the road was definitely fixed, should become released from the reservation at some future time, and then take them as if they had not been reserved at the designated time. A patent could not vest any greater title in the company than became vested by the Act itself at the time the line of the road was definitely fixed. There was no authority to issue a patent for any other lands than those designated and *actually granted* by the act itself. A patent, *on paper*, issued for lands not granted, but expressly reserved from the grant, is not merely irregular, but is absolutely *void*. There is no authority for its *existence*.

The grant is limited by this act to:

Public lands not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim did not attach, at the time the line of the road was definitely fixed, to lands situate within ten (by second act, twenty) miles on each side of the road; to alternate sections designated by odd numbers; and to non-mineral lands (coal and iron lands excepted by second act).

Suppose a patent under this act should show on its face

to have been issued for an even-numbered section, would it support an action in ejectment against a preëmption or homestead settler on the land thus patented? Would such a patent not be void on its face, for want of authority for its existence? Why void on its face? Because *itself* furnishes the evidence of the want of authority for its existence, *i. e.*, it furnishes the evidence of being issued for land not granted.

But suppose that a patent should be issued under this act for an odd-numbered section, situate at a distance of fifty miler from the line of the road, but which fact should not appear on the face of the patent. Will any person contend that a pre-emption claimant in possession of the land thus patented could not show, by proper evidence outside of the patent itself, the location of the land relatively to the line of the road, in an action of ejectment, in order to protect his possession and claim? If the fact thus required to be proven should appear on the face of the patent, it would itself furnish the evidence of the want of authority for its existence. But it is not the *source* of the evidence of the fact, but the *fact* itself, that renders the patent void. Hence evidence is admissible from any other legal source, as well as from the face of the patent itself, to show that the patent was issued for land not granted, has no authority for its existence, and is therefore void.

Rosecrans vs. *Douglass*, 52 *Cal.* 214.

Lands *reserved* by the United States at the time the line of the road was definitely fixed, and for long before and after, were not granted by this act any more than were even-numbered sections, or than were lands fifty miles from he line of the road, etc., etc. And if a preëmption settler can take advantage of the evidence furnished by the patent for the even-numbered section, or can show that the land is fifty miles from the line of the road, in the supposed cases, he can as well, and by the same right, show that the land was *reserved* when the line of the road was definitely fixed.

This position is fully sustained by this Court in

Newhall vs. *Sanger*, 92 *U. S. Rep.* 761, *supra.*

And to the same effect, in principle, is

Leavenworth, etc., vs. *U. S.*, 92 *U. S. Rep.* 733.

The patent *on its face*, following the provisions of the statute, states that reserved lands did not pass by the act under which it claims existence. This was part of plaintiff's own evidence; and, common sense leads us to the conclusion that defendant had the right to show, in defense of his possession and pre-emption claim, that the land was reserved at the time the line of the road was definitely fixed, and for many years before. (Trans. fol. 46).

Act of Congress, July 1st, 1862, (12 U. S. Stat. at Large, p. 492, Sec. 3; and p. 494, Sec. 9.)

Act of Congress July 2d, 1864, (13 U. S. Stat. at Large, p. 358, Sec. 4; and p. 504, Secs. 1 and 2.)

A patent which is only *voidable* may not be attacked collaterally in an action at law. Such a patent conveys the title, and is, of course, good to sustain an action at law until *avoided* or recalled by bill in equity, or *scire facias*. But, a *void* patent is no patent at all. It conveyed nothing; and it presents nothing that may be avoided or recalled in equity or by *scire facias*. Being issued without authority of law, it possesses no quality which the law will, or, indeed can, protect.

This rule is very ancient, and has been very frequently announced by this Court.

In *Patterson* vs. *Winn*, 11 *Wheat. R.*, *p.* 380, it is said:

"We may, therefore, assume as the settled doctrine of "this Court, that if a patent is absolutely void upon its "face, *or the issuing thereof was without authority*, or was "prohibited by statute, or the State had no title, it could "be impeached collaterally in a court of law in an action of "ejectment."

That the issuing of a patent was without authority, etc., must depend upon *facts* from which such a conclusion of law is drawn. And, of course, the establishment of facts calls for *evidence*.

Even in *Moore* vs. *Robbins*, 96 *U. S.* 530, sometimes, but mistakenly, cited against the introduction of evidence in an action at law to show the *nullity* of a patent, it is said: "We "are speaking now of a case in which the officers of the de- "partment have acted *within the scope of their authority*."

And also in the case of *Steele* vs. *Smelting Co.* 106 *U. S. Rep.* 452-3, also sometimes similarly cited, it is said: "It need hardly be said that we are here speaking of a "patent issued in a case where the Land Department had "*juri-diction* to act, the lands forming part of the *public do-* "*main, and the law having provided for their sale.* If they "never were the property of the United States, or if no "legislation authorized their sale, or if they had been pre- "viously disposed *or reserved* from sale, the patent would "be inoperative to pass the title, and the objection to it "could be taken on these grounds *at any time and in any* "*form of action.*

Of course a patent for reserved lands can be made as regular on its face as one for unreserved lands; consequently the evidence to prove its nullity must come from some source other than its own face.

To the same effect are the cases of

Wilcox vs. *Jackson*, 13 *Peters R.* 509;
Easton vs. *Salisbury*, 21 *How.* 432;
Hissel vs. *St. Louis Schools*, 18 *How.* 27;
Reicharts vs. *Felps*, 6 *Wall.* 160.

In *Polk's Lessee* vs. *Wendel*, 9 *Cranch R.* 87, it is said, through Chief Justice Marshall: "There are cases in which "a grant is absolutely void, as where the State has no title "to the thing granted, *or where the officer had no authority to* "*issue the grant.* In such cases the validity of the grant is "necessarily examinable at law."

To the same effect is the case of *St. Louis Co.* vs *Kemp*, 104 U. S. Rep. 636, in which it is said: "Of course when "we speak of the conclusive presumptions attending a "patent for lands, we assume that it was issued in a case "where the Department had jurisdiction to act and execute "it, that is to say, in a case where the lands belonged to "the United States, and provision had been made by law "for their sale. * * If Congress had made no "provision for their sale, *or had reserved them*, the Depart- "ment would have no jurisdiction to transfer them, and its "attempted conveyance of them would be *inoperative and* "*void*, no matter with what seeming regularity the forms of "law may have been observed. * * Matters of "this kind, disclosing a want of jurisdiction, may be con- "sidered by a court of law. In such cases the objection to "the patent reaches beyond the action of the special "tribunal, and goes to the existence of a subject upon "which it was competent to act."

Here the Court also dwells somewhat on the distinction between a patent which is *void* and one which is *voidable* or was irregularly issued. In the former case the patent, in form, conveys no title; in the latter it conveys the title, although it may be avoided in a proper proceeding. A void patent cannot sustain an action either at law or in equity; a voidable patent will sustain an action at law until avoided.

In *Wright* vs. *Roseberry*, 7 *Supreme Court Reporter p.* 999, *et seq.* (May 2, 1887), many of the cases herein quoted from and cited, are reviewed and re-approved to the effect herein contended for.

It would be a senseless and delusive procedure to announce that a patent is void by reason of certain facts and causes and yet preclude the party interested from proving those facts and causes, under the pretense that his evidence is not admissible, *i. e.*, that the void instrument is conclusive evidence of its own validity.

We have heretofore said that it was not because of a controversy on any federal question that plaintiff brought his action in the U. S. Circuit court rather than in the State

court, but in order that he might escape the ruling of the State court on the admissibility of evidence to show the nullity of the patent under which he claims title.

The same patent, in the hands of the same plaintiff, and the same defense based upon the same facts set up here, were presented to the Supreme Court of the State (Cal.); and not only was the patent declared *void* but the evidence thus offered to prove the nullity of the patent was allowed.

Carr vs. *Quigley*, 57 *Cal.* 394.

And the same rule of *evidence*, and the same *conclusion of law*, have been followed by that court whenever occasion required, and from an early day in the age of the State.

See,

McLaughlin vs. *Powell*, 50 *Cal.* 64.
McLaughlin vs. *Fowler*, 52 *Cal.* 203.
Robinson vs. *Forest*, 29 *Cal.* 320.
Parker vs. *Duff*, 47 *Cal.* 555.
Keenan vs. *Griffith*, 27 *Cal.* 87. *S. C.* 31 *Cal.* 462; *and* 34 *Cal.* 584.
Knight vs. *Roche*, 56 *Cal.* 15.
Summers vs. *Dickenson*, 9 *Cal.* 554.
Doll vs. *Meador*, 16 *Cal.* 295;

and many other cases to the same effect.

And perhaps in no case has the Supreme Court of California expressed itself more aptly on the rule of evidence and conclusion of law under discussion than in *S. P. R. R. Co.* vs. *Crampton*, reported in 9 *Pac. Coast Law Journal*, *p.* 744, thus: "If the demanded premises were "within the boundaries of an alleged Mexican or Spanish "grant, which was *sub judice* at the time the Secretary of "the Interior ordered a withdrawal of lands along the "route of the plaintiff's road, they are not embraced by the "grant to the plaintiff (*Newhall* vs. *Sanger*, 92 U. S. 761.) " * * The premises in controversy were not "public lands either at the date of the grant or of their

" withdrawal, and it therefore follows that they did not " pass to the plaintiff.

"It is well settled that in an action of ejectment, *the* " *plaintiff must recover, if at all, upon the strength of his own* " *title, and that if it be shown that he has no title or right of* " *possession, the defendant is entitled to judgment in his favor.* " *In this case the plaintiff's right of possession depended* " *entirely upon the validity of its title. If it had no title it* " *made no difference whether the defendant had or not.* The " plaintiff must show a right of possession in itself before " it can challenge the defendant's right.

" The patent was, doubtless, *prima facie* evidence and " only *prima facie* evidence of title in the plaintiff. * " * *. But when it was shown that said land had " never been granted to the plaintiff, the patent ceased to " be operative as a conveyance. * *

" But all questions which can arise upon this record have " been exhaustively discussed in *Newhall* vs. *Sanger*, *supra*; " and *Carr* vs. *Quigley*, 7 P. C. L. J. 762."

Both this Court and the Supreme Court of California, are fortunately in accord upon this rule of evidence and this conclusion of law; and the learned judge, before whom this cause was tried, was mistaken as to the correct rule, when he rejected defendants' proof that plaintiff has no title to the land sued for, and that the patent under which he claims was issued for *reserved* land, was issued *without authority of law* and is *void*.

" The laws of the State are * * to be regarded " as rules of decision in the courts of the United States " when the Constitution, treaties or statutes of the United " States have not otherwise provided."

Com. Mut. L. Ins. Co. vs. *Schaefer*, 94 *U. S. Rep.* 458.

A patent is but the result of a mere *ex-parte* application, and it is not entitled to as much importance as evidence of title as is frequently supposed. Or in the words of this Court.

"In nine cases out of ten, perhaps in a much larger "percentage, the proceedings are wholly *ex-parte*. In the "absence of any contesting claimant for a right to purchase "or secure the land, the party applying has it all his own "way," etc.

U. S. vs. *Minor*, 114 *U. S. Rep.* 240.

In the case at bar, it is very evident that the party who procured the issuance of the patent under consideration had it all his own way until he served summons on plaintiffs in error to answer the allegation of his complaint that he is *entitled* of the land in controversy. It is pretty certain that he did not say much, when applying for and obtaining the patent, of the fact that the land was held and claimed as a part of a Mexican grant at the time the line of the railroad was definitely fixed. Patents of this character, even void, are usually well worth more than the cost of obtaining them when held by a powerful corporation, its agents or representatives, as against the usual species of defendants, *i. e.*, poor pre-emption settlers.

It is said in *Doll* vs. *Meador*, 16 *Cal.* 295, above cited, that if a patent "be issued in the absence of legislation "directing a disposition of the property described, * * "or for an estate prohibited, its validity may be contro-"verted in any action, either directly or collaterally." And this has been, in substance, many times stated by this Court, as will be seen from even the few citations above made.

The patent in the case at bar was issued in the *absence of legislation, directing a disposition of the property described;* and it was issued for an estate *prohibited* from being thus disposed of.

The proof offered by defendants to show that this patent is *void* is of a higher order than the patent itself. It consists of:

The record of the grant from the Mexican Government;

The decree of the Board of Land Commissioners;

The decree of the U. S. District Court;

The opinion and judgment of this Court;

The records and maps of the U. S. Surveyor General's office.

The records and plats of the U. S. Land Office, general and local;

The Act of Congress, which exempts lands *reserved* "at "the time the line of said road is definitely fixed," which correspond with the words of the patent, such as it is.

These records and judgments were begotten and made after hearing and contest of the parties interested, including the United States.

This patent was issued on an *ex-parte* application by the party who obtained it. The *fact* that rendered its issue *unauthorized* and renders itself *void*, does not appear on its face. Had this fact appeared on its face, it would, itself, furnish proof of its nullity. But, failing to find this proof on its own face, it would be a most singular rule of evidence that would preclude the defendants from looking elsewhere for proof of the same fact. Logically speaking, such proof is not adduced to attack a *patent*, but rather to show that *there is no patent to be attacked*.

A patent for reserved lands can be made as regular on its face as one for unreserved lands; consequently, the evidence to prove its nullity must necessarily come from some source other than its own face. And a *void* patent ought not to prevail as a source of *title*. Indeed, a void patent is no patent at all; by it, there is nothing done; it is not the act of the United States.

The standing and pre-emption claim of defendants are amply sufficient to enable them to defend and maintain their possession of this piece of public land, as against one who has no title at all to it and as against all the world, except the United States. The defendants' rights to the possession of the land are substantial.

Terry vs. *Megerle*, 24 *Cal.* 609. (85 *Am. Dec.* 84.)
Lytle vs. *Arkansas*, 9 *How. R.* 314, 333.
Cunningham vs. *Ashley*, 14 *How.* 388.

We therefore submit, that the United States Circuit Court has no jurisdiction under the pleadings; and,

The Court erred on the trial in rejecting defendants' proof of the nullity of this form of patent, and erred in its instructions to the jury.

MICH. MULLANY,
Counsel for Defendants.

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JAMES H. McKENNEY,

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

JAMES DOOLAN ET AL., *Pl'ffs in Error,*
v.
WILLIAM B. CARR. } *No. 34.*

In Error to the Circuit Court of the United States for the District of California.

BRIEF FOR DEFENDANT IN ERROR.

A. T. BRITTON,
A. B. BROWNE,
W. H. SMITH,
Att'ys for Def't in Error.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1887.

In the Supreme Court of the United States.

OCTOBER TERM, 1867.

JAMES DOOLAN ET AL.

v.

WILLIAM B. CARR.

No. 34.

In Error to the Circuit Court of the United States for the District of California.

Brief for Defendant in Error.

This is an action of ejectment brought by William B. Carr, plaintiff below, against James Doolan and James McCue, defendants below, and now plaintiffs in error, to recover possession of the east half of section 27, township 2 south, range 1 east, Mount Diablo meridian, in the State of California. The complaint alleged that the plaintiff claimed title under the laws and Constitution of the United States, and by a patent of the United States, and that the defendants denied the validity of that patent.

The answer consisted of a denial of jurisdiction, a general denial, and a special defence in substance as follows: That the plaintiff claimed title through a patent of

the United States to the Western Pacific Railroad Company; that there was no grant to the railroad company, because the land was reserved from the grant, by reason of being within the claimed limits of the private land claim, "Las Pocitas," at the time the line of that road was definitely fixed. The answer admitted that the land was excluded fron the final survey of said private land claim.

It further alleged that Doolan and McCue were severally qualified pre-emptors, and had each of them settled upon and offered to file as pre-emptors, on 160 acres of the half section in dispute, and that the same were public lands subject to their pre-emptions.

On the trial the plaintiff gave in evidence a patent to the Central Pacific Railroad Company, dated February 28, 1874. This patent recited that the land was granted to the Western Pacific Railroad Company, and that the Central Pacific was its successor in interest, and entitled to the land.

The defendants objected to the introduction of this patent, upon the sole ground that it had not been shown that the land was not reserved or disposed of by the United States, and was public land at the time the line of the Western Pacific was definitely fixed.

The objection was overruled by the court and the defendants excepted.

Plaintiff then gave in evidence a deed from the Central Pacific Company to himself. This deed was executed by Leland Stanford as President, and E. H. Miller, Jr., as Secretary of the Central Pacific Company, and was under the corporate seal of the Company.

It was objected to by the defendants on the ground that it was not shown that the parties executing it had authority from the Company to make the deed, or that the Central Pacific was the successor in interest of the Western Pacific,

and it was also objected to on the same grounds as those alleged against the patent to the Central Pacific.

This objection was overruled and the defendants excepted.

The defendants, after the plaintiff had rested, moved the court to dismiss the case on the ground that it had no jurisdiction.

This motion was overruled and defendants excepted.

The defendants then offered to prove that the land was within the claimed limits of the "Las Pocitas" at the time the line of the Western Pacific was definitely fixed; that the line of the road was definitely fixed on the 30th of January, 1865; that "during the year 1865" an official survey was made by a deputy surveyor and approved by the Surveyor-General of California, "in the year A. D. "1866," which included these lands; that said survey was set aside by the Secretary of the Interior in 1868, and a new survey ordered which was made in 1869, and finally approved by the Secretary of the Interior June 6, 1871, and that this survey did not include the land in controversy.

They further offered to prove that the lands were surveyed and the plat of the township was filed in the Land Office on the 10th of June, 1865, and that the defendants were qualified pre-emptors and severally made their pre-emption settlements on the land *on the 10th of November*, 1882; and within the thirty days after settlement offered to file their declaratory statements, but the register refused to receive them on the ground that a patent had already issued for the land to the Central Pacific Company.

To the evidence thus offered the plaintiff objected; the court sustained the objection, and defendants excepted.

The court thereupon charged the jury that the patent could not be attacked collaterally and was conclusive of the rights of the parties.

To this charge the defendants excepted.

There was a verdict and judgment for plaintiff.

To reverse that judgment this writ of error is now brought, and the errors assigned are that the court erred in its several rulings above set forth.

ARGUMENT.

I.

Before we proceed to consider the errors assigned we desire to call the attention of the court to the fact that the plaintiffs in error did not appeal from the decision of the register rejecting their declaratory statements. His decision thereupon became final and concluded the rights of the parties. Such is the established rule of the Land Department. (Rev. Stat., sec. 441, 453, 2478; Favrey *v.* Lonsdale, 4 Copp's L. O., 12; Weber *v.* Western Pac. R.R., 6 *Ibid.*, 19).

The first question in the errors assigned that presents itself for the consideration of the court is that of jurisdiction in the court below.

The statute of March 3, 1875 (18 Stat., 470), provides that the circuit courts of the United States shall have "original cognizance, concurrent with the courts of the "several States, of all suits of a civil nature, at common law "or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, "*and arising under the Constitution or laws of the United* "*States.*"

The complaint alleges that this case arises under the Constitution and laws of the United States, and that the plaintiff's title is derived from a patent of the United States,

and that *the validity of that patent is denied by the defendants.*

This allegation is not denied by the answer, but on the contrary it is expressly averred and the reasons therefor stated in detail in the special defence, and insisted upon as a complete defence to the plaintiff's action.

And right here we may as well refer to the point made in the brief of plaintiffs in error, that the complaint does not set forth the facts by reason of which the defendants claimed the patent to be invalid.

If there ever was any force in that objection it was certainly cured by the answer, for it sets forth with great particularity the ground on which the patent was invalid, and that was because the land was reserved by reason of being within the claimed limits of the "Las Pocitas" grant.

The record, taken as a whole, contains a full statement of the facts and comes within the rule of this court in the case cited in plaintiff's brief of Gold Company *v.* Keys (96 U. S., 199), "That it must in some form appear upon the "record, by a statement of facts in legal and logical form," that the case arises under the laws or Constitution of the United States.

This case does arise under the laws of the United States. The patent to the railroad company was issued under those laws. It depends for its vitality upon those laws. If they have not been complied with it is defective and may be void. And the question of such compliance and validity is the main issue in the case.

This court held, in Reichart *v.* Felps (6 Wall., 165), that a case in which the State court had held a land patent of the United States void was properly cognizable in this court under the 25th section of the judiciary act of 1789.

And in Quinn *v.* Chapman (111 U. S., 445) it held that a pre-emption claim was a claim arising under the laws of

the United States, and that, having been held invalid in the State court, this court had jurisdiction.

We rely upon these authorities as conclusive of the question.

II.

Let us next consider the objection made to the deed of the Central Pacific Company to the plaintiff. The court will not fail to notice that there was no objection made as to its execution, and, therefore, it was not necessary to prove that it was executed by the parties to the same. The objection was that it had not been shown that the officers who executed it had authority from the railroad company to execute it.

It was executed by the president and secretary of the company, and was under its corporate seal.

Upon such a state of facts the law presumes that the officers did not exceed their authority.

"When the common seal of a corporation appears to be "affixed to an instrument, and the signatures of the proper "officers are proved, courts are to presume that the officers "did not exceed their authority, and the seal itself is *prima* "*facie* (?) that it was affixed by proper authority."

Ang. & Ames Corp., Sec. 224.
Turnpike Road *v.* Myres, 6 Serg. & R., 12.
Baptist Church *v.* Mulford, 3 Halst. N. J., 183.
Adams *v.* His Creditors, 14 Lous., 455.
Darwell *v.* Dicken's Lessee, 4 Yerg., 7.
Burrill *v.* Nahant Bank, 2 Met., 166.
Commercial Bank *v.* Cartwright, 22 Wend., 348.
Lovett *v.* Steam Saw-Mill, 6 Paige, 54.
Johnson *v.* Beech, 3 Barb. Ch., 207.
Reed *v.* Bradley, 17 Ills., 321.

It was further objected to because it was not shown that the Central Pacific was the successor in interest of the Western Pacific.

That fact was recited in the patent, and the law presumes all the recitals of the patent to be true.

III.

We now come to the main question in the case, and that is as to the admissibility of the evidence, which was excluded by the court, offered by the defendants to show that the land in controversy was within the claimed limits of the "Las Pocitas" grant.

It will be borne in mind that, at the date of the patent, February 28, 1874, the land was confessedly *public land*. The approved final survey had excluded it from the grant. The approval of that survey was made by the Secretary of the Interior on the 6th of June, 1871. From and after that date it was beyond all question public land. Being public land at the date of the patent, and subject to disposition and patent by the Land Department, the question is whether the patent thus issued can be attacked collaterally by showing that the Land Department made a mistake in not holding that the land was reserved and not subject to patent by reason of having been, at some anterior date, within the claimed limits of the "Las Pocitas" grant.

The question of reservation was a question of fact, or a mixed question of law and fact, for the Land Department to decide, and its decision is conclusive upon all parties. This matter has been so often before this court that it can no longer be considered an open question. We will call attention to some of the authorities.

In Johnson *v.* Towsley (13 Wall., 72), Mr. Justice Miller, in delivering the opinion of the court, said:

"When the law has confided to a special tribunal the "authority to hear and determine certain matters arising

" in the course of its duties, the decision of that tribunal, " within the scope of its authority, is conclusive upon all " others. That the action of the Land Office in issuing a " patent for any of the public land, subject to sale by pre- " emption or otherwise, is conclusive of the legal title, must " be admitted under the principle above stated; and in all " courts and in all forms of judicial proceedings, where " this title must control, either by reason of the limited " powers of the court or the essential character of the " proceedings, no inquiry can be permitted into the cir- " cumstances under which it was obtained."

In French *v.* Fyan (93 U. S., 169), a question, identical in principle with that now under consideration, came before this court. A patent had been issued to the State of Missouri for the land in controversy under its swamp-land grant. The plaintiff, in the action of ejectment, offered to prove by parol that this land was not, in fact, swamp and overflowed land.

The court below ruled " that since the defendant had in- " troduced a patent from the United States to the State for " the said land under the act of September 28, 1850, as " swamp land, this concluded the question, and the court " therefore rejected said parol testimony."

Mr. Justice Miller, in delivering the opinion of the court, said:

" The only question that remains to be considered is, " whether in an action at law in which these evidences of " title come in conflict, parol testimony can be received " to show that the land in controversy was never swamp " land, and therefore the patent issued to the State under " the act is void." * * *

" And we are of opinion that, in this action at law, it " would be a departure from sound principles and contrary " to well-considered judgments in this court and in others " of high authority to permit the validity of the patent to " the State to be subjected to the test of the verdict of

" a jury on such oral testimony as might be brought before " it. It would be substituting the jury, or the court sitting " as a jury, for the tribunal which Congress had provided " to determine the question, and would be making a patent " of the United States a cheap and unstable reliance as a " title for lands which it purported to convey."

See also Ehrhart *v.* Hogaboom, 115 U. S., 67.

We call attention of the court to the cases of Shepley *v.* Cowan (91 U. S., 340) and Moore *v.* Robbins (96 *Id.*, 530).

In United States *v.* Schurz (102 U. S., 400) Mr. Justice Miller, in delivering the opinion of the court, said:

" It is argued with much plausibility that the relator was " not entitled to the land by the laws of the United States, " because it was not subject to homestead entry, and that " the patent is, therefore, void, and the law will not require " the Secretary to do a vain thing by delivering it, which " may, at the same time, embarrass the rights of others in " regard to the same land.

" We are not prepared to say that if the patent is abso- " lutely void, so that no right could possibly accrue to the " plaintiff under it, the suggestion would not be a sound one. " But the distinction between a void and a voidable instru- " ment, though sometimes a very nice one, is still a well " recognized distinction, on which valuable rights often de- " pend. And the case before us is one to which we think " it is clearly applicable. To the officers of the Land De- " partment, among whom we include the Secretary of the " Interior, is confided, as we have said, the administration " of the laws concerning the sale of the public domain. " The land in the present case had been surveyed, and under " their control the land in that district generally had been " opened to pre-emption, homestead entry, and sale. The " question whether any particular tract was open to sale, " pre-emption, or homestead right is in every instance a " question of law as applied to the facts for the determina- " tion of these officers. Their decision of such question

" and of conflicting claims to the same land by different " parties is *judicial in its character*.

" It is clear that the right and the duty of deciding all " such questions belong to those officers, and the statutes " have provided for original and appellate hearings in that " department before the successive officers of higher grade " up to the Secretary. They have therefore *jurisdiction of* " *such cases*, and provision is made for the correction of errors " in the exercise of that jurisdiction. When their decision of " such questions is finally made and recorded in the shape of " a patent, *how can it be said that the instrument is absolutely* " *void for such errors as these?* If a patent should issue for " land in the State of Massachusetts, where the Government " never had any, it would be absolutely void. If it should " issue for land once owned by the Government, but long " before sold and conveyed by patent to another who held " possession, it might be held void in a court of law on the " production of the senior patent. But such is not the case " before us. *Here the question is whether this land had* " *been withdrawn from the control of the Land Department* " *by certain acts of other persons which include it within* " *the limits of an incorporated town. The whole question* " *is one of disputed law and disputed facts. It was a* " *question for the land officers to consider and decide before* " *they determined to issue McBride's patent.* It was within " their jurisdiction to do so. *If they decided erroneously* " *the patent may be voidable, but not absolutely void.*

" The mode of avoiding it, if voidable, is not by arbitrarily " withholding it, but by judicial proceedings to set it aside, " or to correct it if partly wrong. It was within the pro- " vince of those officers to sell the land and to decide to " whom and for what price it should be sold; and when in " accordance with their decision, it was sold, the money " paid for it and the grant carried into effect by a duly- " executed patent, that instrument carried with it the title " of the United States to the land."

In Quinby *v.* Conlan (104 U. S., 425), this court said:

" But independently of this conclusion there is a general " answer to the alleged erroneous rulings of the officers of the

" Land Department as grounds for the interference of this " court. Those rulings were upon mere matters of fact, or " upon mixed questions of law and fact, which were properly " cognizable and determinable by the officers of that depart- " ment. * * * The courts cannot exercise any direct ap- " pellate jurisdiction over the rulings of those officers or of " their superiors in the department in such matters, nor can " they reverse or correct them in a collateral proceeding " between the parties. * * * It would lead to endless " litigation, and be fruitful of evil if a supervisory power " were vested in the courts over the action of the numerous " officers of the Land Department on mere questions of fact " presented for their determination. It is only when those " officers have misconstrued the law applicable to the case, " as established before the department, and thus have de- " nied to parties rights which, upon a correct construction, " would have been conceded to them, or where misrep- " resentation and fraud have been practised, necessarily " affecting their judgment, that the courts can, in a proper " proceeding, interfere and refuse to give effect to their " action. On this subject we have *repeatedly and with* " *emphasis expressed our opinion, and the matter should be* " *deemed settled.*

" Johnson *v.* Towsley, 13 Wall., 72.
" Shepley *v.* Cowan, 91 U. S., 330–340.
" Moore *v.* Robbins, 96 *Id.*, 530."

In Smelting Company *v.* Kemp (104 U. S., 640), Mr. Justice Field, in delivering the opinion of the court, said:

" The patent of the United States is the conveyance by " which the nation passes its title to portions of the public " domain.

" For the transfer of that title the law has made numerous " provisions, designating the persons who may acquire it " and the terms of its acquisition. That the provisions may be " properly carried out, a Land Department, as part of the " administrative and executive branch of the Government, " has been created to supervise all the various proceedings " taken to obtain the title, from their commencement to " their close. In the course of their duty the officers of that

" department are constantly called upon to hear testimony
" as to matters presented for their consideration, and to pass
" upon its competency, credibility, and weight. In that re-
" spect they exercise a judicial function, and therefore it
" has been held in various instances by this court that their
" judgment as to matters of fact, properly determinable by
" them, is conclusive when brought to notice in a collateral
" proceeding. Their judgment in such cases is like that of
" other special tribunals upon matters within their exclusive
" jurisdiction, unassailable except by a direct proceeding for
" its correction or annulment. The execution and record of
" the patent are the final acts of the officers of the Govern-
" ment for the transfer of its title, and as they can be law-
" fully performed only after certain steps have been taken,
" that instrument, duly signed, countersigned, and sealed,
" not merely operates to pass the title, but it is in the nature
" of an official declaration by that branch of the Govern-
" ment to which the alienation of the public lands, under the
" law, is intrusted, that all the requirements preliminary to
" its issue have been complied with. The presumptions
" thus attending it are not open to rebuttal in an action at
" law. It is this unassailable character which gives to it its
" chief, indeed, its only value, as a means of quieting its
" possessor in the enjoyment of the lands it embraces. If
" intruders upon them could compel him, in every suit for
" possession, to establish the validity of the action of the
" Land Department and the correctness of its ruling upon
" matters submitted to it, the patent, instead of being a
" means of peace and security, would subject his rights to
" constant and ruinous litigation. He would recover one
" portion of his land if the jury were satisfied that the evi-
" dence produced justified the action of that department,
" and lose another portion, the title whereto rests upon the
" same facts, because another jury came to a different con-
" clusion. So his rights in different suits upon the same
" patent would be determined, not by its efficacy as a con-
" veyance of the Government, but according to the fluc-
" tuating prejudices of different jurymen, or their varying
" capacities to weigh evidence.

" Moore *v.* Wilkinson, 13 Cal., 478.

" Beard *v.* Federy, 3 Wall., 478–492."

In Steel *v.* Smelting Company (106 U. S., 447), the question was whether a mineral patent could be attacked collaterally by showing that the lands patented were *reserved* from disposition and sale by reason of being within the town site of Leadville.

Mr. Justice Field, in delivery the opinion of the court said:

"We have so often had occasion to speak of the Land "Department, the object of its creation and the powers it "possesses in the alienation by patent of portions of the "public lands, that it creates an unpleasant surprise to "find that counsel, in discussing the effect to be given to "the action of that department, overlook our decisions on "the subject. That department, as we have repeatedly "said, was established to supervise the various proceed-"ings whereby a conveyance of the title from the United "States to portions of the public domain is obtained, and "to see that the requirements of different acts of Congress "are fully complied with. Necessarily, therefore, it must "consider and pass upon the qualifications of the appli-"cant, the acts he has performed to secure the title, *the* "*nature of the land and whether it is of the class which is* "*open to sale.* Its judgment upon these matters is that of "a special tribunal and is *unassailable except by direct* "*proceedings for its annulment or limitation.* Such has "been the uniform language of this court in repeated "decisions." * * *

"It is among the elementary principles of the law that "in actions of ejectment the legal title must prevail; the "patent of the United States passes that title. Whoever "holds it must recover against those who have only un-"realized hopes to obtain it, or claims which it is "the exclusive province of a court of equity to enforce. "However great these may be, they constitute no defence "in an action at law based upon the patent. That instru-"ment must first be got out of the way, or its enforcement "enjoined, before others having equitable rights can gain "or hold possession of the lands it covers. This is so well

" established, so completely embedded in the law of eject-
" ment, that no one ought to be misled by any argument
" to the contrary." * * * "It" (the patent) "cannot be
" vacated or limited in proceedings where it comes col-
" laterally in question. It cannot be vacated or limited by
" the officers themselves; their power over the land is
" ended when the patent is issued and placed on the
" records of the Department. This can be accomplished
" only by regular proceedings, taken in the name of the
" Government for that special purpose."

It would seem, from this citation of authorities, that the question is forever settled, and settled as we claim the law to be, and as the Circuit Court held it.

We do not contend that the question made in this case might not be made in a proper case, by a proper party, in a direct proceeding by the United States to set aside the patent, but we do contend that it cannot be tried *collaterally*, at the instance of these parties, who are naked trespassers, and who did not initiate their pretended pre-emption claims until more than eight years after the patent issued.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
W. H. SMITH,
Attys. for Deft. in Error.

In the Supreme Court of the United States.

JAMES DOOLAN, *et al.*,
Plaintiffs in Error,
vs.
WM. B. CARR,
Defendant in Error.

No. 34.—*October Term*, 1887.

SUPPLEMENTAL AND REPLY BRIEF FOR PLAINTIFFS IN ERROR.

In addition to what is said in the "Brief on behalf of Plaintiffs in Error," already filed, the following points and authorities are most respectfully presented, as a concise summary of the position relied upon by the plaintiffs in error for a reversal of the judgment in this case; and also as a reply to the brief of defendant in error.

Concerning the principal error assigned in this case, viz: the rejection of the proof offered by the defendants below, to the effect that the land was reserved and disposed of when the line of the road was fixed, we respectfully submit the following points:

I.

The Pacific Railroad Act, of July 1, 1862, amended July 2, 1864, (12 St., 492, Sec. 3, and 13 St., 358,) constitutes a grant *in præsenti* of "every alternate section of *public* land, designated by odd numbers, to the amount of ten alternate sections per mile on each side of said railroad * * * not sold, *reserved*, or otherwise disposed of by the United States, and to which a pre-emption or homestead may not have attached, at the time the line of said road is definitely fixed."

It was this act of Congress *itself*, and *not* the patent sub-

sequently issued, which conveyed the title to the railroad company for the lands granted. At most, the patent, when issued for lands granted by the act, is but mere *evidence* obtained on *ex parte* application, from ministerial officers, of a *prior conveyance* or investiture of the *title* made by Congress through the act itself.

Schulenberg vs. *Harriman*, 21 Wall. R., 58.
Missouri Ry. Co. vs. *Kansas Ry. Co.*, 97 U. S. Rep., 497.
Van Wyck vs. *Knevals*, 106 U. S. Rep., 370.
Wright vs. *Rosberry*, 121 U. S. Rep., 488.
Railroad Co. vs. *Baldwin*, 103 U. S. Rep., 427.
Leavenworth, &c., R. Co. vs. *U. S.*, 92 U. S. Rep., 743.

It would be a grant *in præsenti* even if the wording of the act were less expressing in that behalf than it actually is.

Rutherford vs. *Greene's heirs*, 2 Wheat. R., 196.
Langdean vs. *Hanes*, 21 Wall. R., 521.
Stark vs. *Starrs*, 6 Wall. R., 402.

II.

The *title* to the land granted by the act did not at all depend on the patent; and the issuance or non-issuance of the patent did not affect the *title* or *ownership* of the lands which were either *granted* or *excepted* from the grant, by the act of Congress, and did not increase or diminish the title or ownership which the act alone conferred. Hence, the party holding the railroad title to lands granted by the act, after the line of the road was definitely fixed, could maintain his action at law or in equity for or concerning the lands, as well before as after the issuance of the patent.

Van Wyck vs. *Knevals*, *supra*.
Missouri Ry. Co. vs. *Kansas Ry. Co.*, *supra*.

III.

But the lands which were excepted from the grant (viz:

such as were sold, reserved, or otherwise disposed of when the line of the road was fixed,) were *not* granted or at all affected by the act, and were as free from its operation as if it had never been passed. And a patent certificate for such excepted lands is *false evidence—i. e.*, purporting to show that the lands therein described were granted by the act, when in fact and in law they were not.

Leavenworth, &c., R. Co. vs. *U. S., supra.*
U. S. vs. *Stone*, 2 Wall. R., 525.
Dubuque & Pac. R. Co. vs. *Litchfield*, 23 How., U. S. Rep., 66.

IV.

A patent issued by the executive officers for lands *excepted and reserved* by the Pacific Railroad Act from the grant thereby made, and under which act alone the patent purports to be issued, is not only without authority of law, but is issued contrary to the express provisions of law. It is not merely irregular. It is a patent only in form, but it is *nothing* in law or in fact. It is *void*.

Newhall vs. *Sanger*, 92 U. S. Rep., 761.
Carr vs. *Quigley*, 57 Cal., 394.
McLaughlin vs. *Powell*, 50 Cal., 64.
McLaughlin vs. *Fowler*, 52 Cal., 203.
Reichart vs. *Felps*, 6 Wall. R., 160.
Best vs. *Polk*, 18 Wall. R., 112.

V.

The Pacific Railroad Act was passed in 1862 and amended in 1864, and the line of the road was definitely fixed prior to January 31, 1865; and the granted lands were ordered withdrawn for the benefit of the road on January 31, 1865.

The land in controversy having been held and claimed as a part of a valid Mexican grant continually from April, 1839, to June 6, 1871, and being within the boundaries and actual

surveys of such Mexican grant, it was reserved by the United States under her laws to meet the demands of such Mexican grant, and it was expressly excepted from the operation of, and the grant made by, the Pacific Railroad Act. And the patent issued therefor to the Central Pacific Railroad Company by the executive officers of the Government was issued not only without authority of law, but indeed against law. It is *false evidence*, and it is *void*.

Newhall vs. *Sanger*, *supra*.
Leavenworth, &c., R. Co. vs. *U. S.*, *supra*.
Carr vs. *Quigley*, 57 Cal., 374, *supra*.
Reichart vs. *Felps*, *supra*.
Best vs. *Polk*, *supra*.
U. S. vs. *Stone*, *supra*.
McLaughlin vs. *Powell*, 50 Cal., 64, *supra*.
Doll vs. *Meador*, 16 Cal., 295.

VI.

But it would be idle to say that in such case the land was not granted to the party asserting title, and his patent was issued without authority of law, or contrary to law, and it is void, if the facts proving the reservation of the land from the railway grant, and the consequent nullity of the patent cannot be shown. It forces itself upon our reason that it is competent to prove such facts by some kind of evidence.

The objection made and sustained to the proof which defendants offered to make, that plaintiff has no title or right to the land in controversy, and that his patent is void, was solely to the effect "that the said U. S. patent and the recitals therein contained are conclusive evidence in this action, that the legal title of the lands therein described was granted and transferred by the United States to the grantee named in said patent." (*Rec., p.* 22, *fol.* 75.)

The charge of the court to the jury was based upon this objection and the ruling sustaining it. (*Rec., p.* 23.)

It is submitted, with great respect, that this ruling and

charge are founded upon a mistaken view of the law, and thereby a most material error has been committed in this case.

In an action at law, based solely on title claimed to have been acquired under the act in question, (Pacific Railroad Act,) it is competent and proper for defendant to deny that the title was acquired by plaintiff under the act, and to sustain the denial by proving that the land sought to be recovered was reserved or otherwise disposed of at the time the line of the road was definitely fixed, and therefore excepted from the operation of the act. And this proof would be competent and proper whether plaintiff claiming title under the act should or should not use a patent as evidence of his alleged title.

Or, in the words of this Court: "The complaint alleges property and right of possession in the plaintiff; the answer traverses directly these allegations; and under the issue thus formed, *any evidence* was admissible on the part of defendant which went to show that the plaintiffs had neither property nor right of possession."

Schulenberg vs. *Harriman*, 21 Wall, R. 58–9, *supra.*

"It has always been held that an absolute want of power to issue a patent could be shown in a court of law to defeat a title set up under it."

Sherman vs. *Buick*, 93 U. S. Rep., 216, citing—
Stoddard vs. *Chambers*, 2 How. U. S. Rep., 317.
Easton vs. *Salsbury*, 21 *id.*, 426.
Reichart vs. *Felps*, 6 Wall. Rep., 160.

It is over sixty years ago since it was said by this Court, after considering the subject at length:

"We may, therefore, assume as the settled doctrine of this Court, that if a patent is absolutely void upon its face, *or the issuing thereof was without authority, or was prohibited by*

statute, or the State had no title, it may be impeached collaterally in a court of law, in an action of ejectment."

Patterson vs. *Weim*, 11 Wheat., 384 (1826).
Citing—*Polk's Lessee* vs. *Wendell*, 9 Cranch, 87 (1815).
Same Case, 5 Wheat., 293 (1820).
Jackson vs. *Lawton*, 10 John's Rep., 23 (1813).

The same rule prevails in the State from which this case has come, and has uniformly prevailed there.

Carr vs. *Quigley*, 57 Cal., 394, *supra*.
Doll vs. *Meador*, 16 Cal.,

and a long line of other cases, some of which have been already cited.

From the nature of things, this rule seems to recommend itself instantaneously. It is, in short, expressed thus:

If the plaintiff shall introduce false evidence to show title for the land in himself, whether such evidence be in the form of a patent purporting to be issued under the Pacific Railroad Act, or in any other form, the defendant has the right, and it is competent for him to show that plaintiff's evidence is false and that he has no title. The evidence is not offered by defendants for the purpose of attacking or even avoiding a patent. It is offered for the purpose of proving that there is no patent (or title) to be attacked or avoided.

Then, in the case at bar, the evidence offered to prove the falsity and nullity of this patent, is documentary, from the public offices of the Government, begotten through adjudication and contest, &c., and is of a higher character than this patent, obtained on mere *ex parte* application.

VII.

The argument of defendant in error, and the authorities cited and quoted from in support of it, are totally beside the main question in this case. There seems to be no attempt

made on the part of defendant in error to meet the main question, nor to reply to the argument or authorities cited in support of it, on the part of plaintiffs in error.

We do not differ upon the correctness of the rule that, in any case where the *title* has *passed* by means of the patent itself, or by means of the act under which the patent was issued, and even where the title has passed erroneously by means of the patent, or where the patent may be voidable, the legal title thus conveyed will prevail in an action of ejectment.

Congress has, from time to time, passed laws authorizing the officers of the Land Department to dispose of and *grant* the public lands, and to hear and determine the respective rights of parties to obtain grants for given or prescribed portions thereof. In such cases the officers convey the title of the United States through the means of patents. They also have the power of hearing testimony and of trying and determining the respective rights and claims of the parties seeking patents at their hands. This course is exemplified under the homestead, pre-emption and mining laws. In such cases the officers act in the capacity of judges, as to the rights and claims of the parties seeking conveyances or patents from them, and they also act in the capacity of attorneys in fact of the United Sates in conveying the title for the lands placed at their disposal for that purpose. In such instances the act of Congress under which the officers proceed does not of itself grant or convey any title. The title remains in the United States until the officers convey it under the authority of the act of Congress by means of the patent, after having previously decided as to the proper party to receive the title or grant.

Hence it will be seen that, under the provisions of one act, (as, for instance, the Pacific Railroad Act,) the patent does not convey the title, but only furnishes evidence of the prior conveyance made by the act itself; while under the provisions of another act, (as, for instance, the pre-emption,

mining, or homestead act,) the title is conveyed by the means of the patent.

This distinction has been observed by this Court in

Langdeau vs. *Hanes*, 21 Wall. R., 529–'30,

the language used being, of course, framed and applied to suit the facts of that case. And it is quoted with approval, in considering the same distinction arising under a different but analagous act of Congress, in

Wright vs. *Roseberry*, 121 U. S. Rep., 499.

So, the real question presented in an action at law (ejectment), based upon title, when the title of plaintiff is traversed, is, Does plaintiff hold the title, and *not* Does plaintiff hold a patent? And this question, in turn, leads to the inquiry at the very outset, Under what act of Congress does plaintiff claim to have acquired his alleged title?

In this behalf as already argued, the plaintiff may have the title and yet have no patent; or, he may have a patent and yet have no title. And, if he claims to have the title but no patent, he may undoubtedly make proof of his title by evidence other than the patent, and there is no reason why the defendant may not disprove such evidence, if he can, in any action based upon alleged title. And, if the plaintiff have no title but yet have a patent, and use the same as evidence of title, there is no reason why the defendant may not prove that plaintiff's evidence is false, by proving, (as in the first supposed instance,) that plaintiff has no title; and which, *ipso facto*, proves that his patent is void as well as false.

We submit that the application of these views will dispose of the argument made and authorities cited and quoted from by defendant in error, without interference with the argument or authorities of plaintiffs in error. The rule invoked by defendant in error is briefly this: In an action of ejectment, the legal title (however acquired) must prevail. To this the reply is: We admit what you state, but we say that, in an action of ejectment based on title alone,

if plaintiff has no title, no matter how much evidence he may have, he must not prevail.

VIII.

Plaintiff in error seems inclined to urge that because the land in controversy became released from its reserved condition, some six or seven years after the line of the road was definitely fixed, but before the patent was issued to the railroad company, the patent conveyed the title, as it might have done if issued by the same officers under the homestead, pre-emption, or mining laws.

We have already discussed the distinction in this behalf, and consider that it has been long settled by numerous decisions of this Court, some of which have been already cited here.

Newhall vs. *Sanger*, *supra*, and many others.

It is also mentioned by defendant in error that if the plaintiff in error did not appeal from the register to the Commissioner of the Land Office, it gave defendant in error a title to the land under the Pacific Railroad Act.

We are not aware of any law by which the railroad company obtains title to lands by that means. That may be a proper subject to be considered under some circumstances, between rival pre-emption settlers, or the like, but it does not beget title for the railroad company. As a matter of fact, such an appeal is now pending before the Commissioner. But that is of no consequence either way at the present time. Defendants below were not allowed to make any proof at all, or introduce any evidence whatever.

The rule is too simple to require argument or citation of authorities that, in an action of ejectment, the plaintiff must recover solely, if at all, on the strength of his own title, and not to any extent on the weakness of defendant's title.

Under the proof offered, the land in controversy is, and since June 6, 1871, has been, public land of the United

States, subject only to the pre-emption claim and settlement of the plaintiffs in error. Their possession, settlement, and occupation of the land are authorized and invited by the laws of the United States. Defendant in error has no right to the land, and his pretensions ought not to prevail as against those who are rightfully and lawfully in possession, qualified under the laws to pre-empt the land, and complying with the requirements of law in that behalf, as far as they are permitted to do so, and not obstructed by plaintiff's claim and pretension.

IX.

As to the jurisdiction of the Circuit Court to hear and determine this case, "it must in some form appear upon the record, by a statement of facts * * that the suit is one which really and substantially involves a dispute or controversy as to a right which depends upon the construction or effect of * * some law of the United States." (6 Otto, 199.)

No such statement of facts, in any form, has been made here. And upon the objection of plaintiff below to the proofs offered by defendants, no dispute or controversy was permitted to take place or to be presented in this case as to any right which depends upon the construction or effect of a law of the United States. For aught that appears or has been developed, both plaintiff and defendants may be agreed as to the construction or effect of the Pacific Railroad Act, or any other act that may be mentioned, none being mentioned yet upon the construction or effect of which they disagree.

If plaintiff claims or shall claim that his alleged right to the land sued for depends upon the construction or effect of the Pacific Railroad Act, or any other act, and state the facts to which such construction or effect of the act is to be applied, then there may be a controversy; and if such facts are fully and truly stated, they must necessarily embrace all

that the defendants set up in their answer and offered to prove on the trial. Then, the defendants' side of the controversy will be heard, and their offered proofs either stated or admitted by plaintiff. The defendants, therefore, cordially desire and invite such controversy as will be sufficient under the decisions of this Court to give the Circuit Court jurisdiction, as it will enable them to make out their case.

But the argument is that, defendants below made a sufficient statement of facts in their answer to supply the defect of the complaint, on the matter of jurisdiction. Upon the objection of plaintiff, the Court ruled this statement of facts out of the case, whether sufficient for the purpose of jurisdiction or not, and which ruling is now assigned as the main error committed on the trial. It is not permissible for plaintiff to treat the statement of facts in the answer as if it was not made at all, and have it ruled out accordingly, and at the same time ask the Court to consider that statement embodied in his own complaint for the purpose of presenting a sufficient statement of facts to bring his action within the jurisdiction of the Court. If the statement of facts set forth in the answer are invoked by the plaintiff to save the jurisdiction, they must be considered the subject of the dispute or controversy arising herein, and this necessarily calls for a trial thereon. That is all the defendants below desire in this case.

It is most respectfully submitted that the judgment herein should be reversed, with instructions to allow the proof offered by plaintiffs in error, and with such order on the question of jurisdiction as this Court may consider proper in the case.

MICH. MULLANY,
Counsel for Plaintiffs in Error.

1 In the Court of Claims.

ASHER C. BAKER
vs.
THE UNITED STATES. } No. 15467.

I.—*Petition—Filed Jan'y* 21, 1887.

To the honorable the Judges of the Court of Claims:

The petition of Asher C. Baker respectfully shows to your honors:

That he is a citizen of the United States and an officer of the Navy thereof, to wit, a lieutenant, and that his military history is as follows: Midshipman, 30 Sept., 1867; ensign, 14 July, 1872; master, 6 Dec., 1876; lieutenant, 10 Jan'y, 1884.

Your petitioner further says that the lowest grade having graduated pay held by him since last entering the service is, under the act of July 15th, 1870 (R. S., sec. 1556), that of ensign, and that the pay of said grade is as follows:

	Per annum.		
	At sea.	On shore.	On leave.
First five years from date of commission	$1,200	$1,000	$800
After " " " " " "	1,400	1,200	1,000

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3 II.—*General traverse—Filed Feb'y* 16, 1887.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBERT A. HOWARD,
Assistant Attorney-General.

4 III.—*Final judgment.*

At a Court of Claims held at the city of Washington on the 16th day of February, A. D. 1887, judgment was ordered to be entered up as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree, that the said Asher C. Baker do have and recover of and from the United States the sum of eight hundred and thirty-six and sixty-three $\frac{1}{100}$ dollars ($836.63).

IV.—*Application for appeal.*

From the judgment rendered in the above-entitled cause, on February 16, 1887, in favor of claimant, the defendants, by their Attorney-General, on the 13th day of May, 1887, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
Asst. Attorney-General.

5 V.—*Stipulation and order rescinding judgment and granting new trial.*

It is hereby stipulated that with the consent of the court the appeal prayed for in behalf of defendant to the Supreme Court be withdrawn, the judgment rescinded, and the case be remanded to the general docket for a new trial.

ROBERT A. HOWARD,
Asst. Atty. Gen'l.
JOHN PAUL JONES,
Atty. for Claimant.

Filed Mch. 1, 1888.

And now, to wit, March 1, 1888, upon motion in behalf of defendant in open court, it is ordered that the appeal to the Supreme Court prayed for in behalf of defendant be withdrawn, the judgment rescinded, and the case be remanded to the general docket for a new trial.

6 VI.—*Findings of fact.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

September 30, 1867, the claimant was appointed a midshipman in the Navy. The form of his appointment, being the form then in use, was as follows:

"UNITED STATES OF AMERICA,
"*Navy Department.*

"By direction of the President of the United States, you are hereby appointed to the grade of midshipman in the United States Navy, from the day of , one thousand eight hundred and sixty .

"Given under my hand and seal of the Navy Department, at the city of Washington, this day of , one thousand eight hundred and sixty .

"_____,
"*Secretary of the Navy.*"

After July 1, 1870, this form was changed by striking out the words "appointed to the grade of midshipman," and inserting "appointed a cadet midshipman." No appointment in the amended form was issued to the claimant.

7 II.

After completing his academic course at Annapolis the claimant was, July 14, 1872, promoted to the grade of ensign; December 6, 1876, to master; and January 10, 1884, to lieutenant, in which grade he is now serving.

CONCLUSION OF LAW.

Upon the foregoing finding of facts the court decides, as conclusion of law, that the claimant is entitled to recover $836.71.

VII.—*Opinion.*

SCOFIELD, J., delivered the opinion of the court:

The claimant was appointed a midshipman in the Navy September 30, 1867. After completing his academic course he was promoted to ensign July 14, 1872. December 6, 1876, he was promoted to master, and January 10, 1884, he became a lieutenant, in which grade he still remains.

He sues to recover longevity pay, which he claims should be calculated according to the act of March 3, 1883 (22 Stat., 473). That act is as follows:

"And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volun-
8 teer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said

service had been continuous, and in the regular Navy in the lowest grade having graduated pay held by such officer since last entering the service: Provided, that nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers: Provided further, that nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in the volunteer Army or Navy."

The only question involved in this case is whether the claimant, while pursuing his studies at the Naval Academy, was, within the meaning of this act, serving as an officer or enlisted man in the Navy.

Section 1 of the act of July 16, 1862 (12 Stat., 583), divides the line officers of the Navy into nine grades. Rear-admirals are assigned to the first grade and midshipmen to the last.

Then section 11 of the same act provides "that the students at the Naval Academy shall be styled midshipmen."

The one section creates the grade of midshipmen and the other fills it with the students at the Academy. If these provisions have not been changed by subsequent legislation, we see no way to avoid the conclusion that the students are officers in the line of the Navy.

Section 12 of the act of July 15, 1870 (16 Stat., 321), now section 1512 of the Revised Statutes, provides, "that students at the Naval Academy shall hereafter be styled cadet midshipmen."

We can not join in the conclusion arrived at by the defendants, that by this single change of title the students are placed entirely outside the Navy. The act itself does not so declare. It divides the grade of midshipman on a marked and convenient line, and styles all below that line as cadet midshipmen, but relative to their new status it is entirely silent. This might, with much reason, be regarded, nothing to the contrary appearing, as the creation of a new grade in the line of the Navy for cadet midshipmen. A failure, however, to enumerate it as such in the list of grades given in this act, and also in the subsequent list of the Revised Statutes, precludes that construction. It leaves them, however, with the same duties, the same pay, the same mode of appointment, and subject to the same naval discipline and control as before. If the act, in correspondingly apt language, had provided that all captains below a certain rank in that grade should thereafter be styled lieutenant-captains, but had failed to enumerate lieutenant-captains in the list of grades, it could not reasonably be inferred that the lieutenant-captains were thereby legislated out of the Navy. Yet the cases are very similar, if not altogether alike.

Whatever doubt may arise as to the particular status of the students under the new title, it is quite certain, in the opinion of the court, they still constitute, in some capacity, a part of the Navy.

Subsequent legislation, very clearly recognizes them as belonging to the Navy.

Section 1556 of the Revised Statutes, in prescribing the pay of all parties in the Navy, places them, in the line of enumeration, next below midshipmen and next above mates.

Again, by the act of June 23, 1874 (18 Stat., 203), they are subjected, for certain offences, to trial by court-martial. If they constitute no part of the Navy, they are entitled under the Constitution to trial by jury.

It is further contended that, even admitting the claimant was an officer or enlisted man in the Navy, during his term at the Academy, it does not follow that he served as such. He was at the Academy, so they argue, only for education. That is true, but the education was at the request and for the benefit of the Government rather than for himself. A raw
12 recruit is not sent to the front until he has had a course of instruction, discipline, and drill in the camp. That the time thus spent would constitute service in the Army no one would doubt. Education at the Academy, though of a higher order, is required and justified by the same principle.

The law recognizes this education as service by paying for it at the rate of $500 a year.

We are, therefore, of opinion that, in calculating the claimant's longevity pay, he should be credited in the grade of ensign with the time from September 30, 1867, to July 14, 1872. This calculation entitles him to claim $836.71 in addition to the pay already received. Judgment will be entered accordingly.

VIII.—*Final judgment.*

At a Court of Claims held at the city of Washington on the 19th day of March, A. D. 1888, judgment was ordered to be entered up as follows:
13 The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said Asher C. Baker do have and recover of and from the United States the sum of eight hundred and thirty-six and seventy-one $\frac{1}{100}$ dollars ($836.71).

IX.—*Application for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 19th of Febr'y, 1888, in favor of claimant, the defendants, by their Attorney-General, on the 20th day of March, 1888, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
Ass't Attorney-General.

Allowed in open court.

WILLIAM A. RICHARDSON,
Chief Justice.

14 X.

In the Court of Claims.

ASHER C. BAKER
vs.
THE UNITED STATES. } No. 15467.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court,

of the application of the defendants for, and the allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 21st day of March, A. D. 1888.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 1394. The United States, appellant, vs. Asher C. Baker. Court of Claims. Filed March 21, 1888.

123-646

FILED
MAR 31 1893
JAMES H. McKENNEY

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANT,
vs.
ASHER C. BAKER. } No. 1394.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT AND BRIEF ON ARGUMENT FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANT,
vs.
ASHER C. BAKER. } No. 1394.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT AND BRIEF OF ARGUMENT FOR APPELLANT.

STATEMENT.

This is an appeal from a judgment rendered by the Court of Claims against the United States in favor of Asher C. Baker for the sum of $836.71.

Baker was appointed September 31, 1867, in pursuance of law, a student at the United States Naval Academy, at Annapolis, Md. He was, by the form then in use, appointed a "midshipman."

After completing his academic course he was, July 14, 1872, promoted to the rank of ensign; December 6, 1876,

to master, and January 10, 1884, to lieutenant, in which grade he is now serving.

He is entitled to the benefit of what is known as the lonevity pay act of 1883 (22 Stat. 473) in the grade of ensign. He claims that in calculating his term of service the time he was a student at Annapolis should be included.

The act is as follows:

> And all officers of the Navy shall be credited with the *actual time they may have served* as *officers or enlisted men* in the regular or volunteer Army or Navy, or both and shall receive all the benefits of such actual service, in all respects in the same manner as if all said service had been continuous and in the regular Navy, in the lowest grade having graduated pay held by such officer since last entering the service;

It is contended in behalf of the Government that claimant, whilst a student at the Naval Academy, did not, in the sense of the above-cited act, *serve* either as an officer or enlisted man.

In this view it is immaterial as to whether, as a student, he should or should not be regarded as an officer of the Navy.

The court below recognizes his period of education as a period of service, for the reason that he was, during the time, paid at the rate of $500 per year.

It is further urged by claimant that, as by a decision of this court (*United States* vs. *Morton*, 112 U. S. R., 1), a student at West Point Military Academy is decided to be in service in the Army, by parity of reasoning a student at

the Naval Academy at Annapolis should be decided to be in service of the Navy.

It is contended in behalf of the Government that the pupilage of a West Point student is service, because expressly so made by law; that the pupil at the Naval Academy is not in service in the Navy, because he is neither in fact nor by law in service.

The questions at issue having been decided in the court below adversely to the Government, this appeal is taken.

ASSIGNMENTS OF ERROR.

The court erred—

(1) In finding, as a conclusion of law, that claimant is entitled to recover $836.71.

(2) In deciding that the law recognizes the education of claimant at the Naval Academy as service by paying for it at the rate of $500 per year.

(3) In finding any amount to be due claimant.

(4) In rendering a judgment in favor of claimant and against the United States for $836.71.

BRIEF OF ARGUMENT.

In the construction of the longevity pay act of 1883 (*supra*), which was embodied in the naval appropriation act of that year, a number of questions have been presented to and received the consideration of this court. All military service, whether rendered in the regular or volunteer Army or Navy or whether continuous or irreg-

ular, is regarded by Congress as of equal merit. In this view a clause was incorporated in the naval appropriation act of 1882 (22 Stat., 287) to the effect that

> All officers of the Navy shall be credited with the actual time they have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, * * * as if all said service had been continuous and in the regular Navy.

A question arose in the application of the law, in the cases presented, as to the manner in which such service should be credited. This was defined in the act of 1883 (*supra*), to be "in the lowest grade having graduated pay held by such officer since last entering the service."

In so giving credits, it was found that in very many instances irregular and non-continuous service had an advantage over continuous and regular service in the Navy. The claim was thereupon made by officers of the Navy in continuous service that *they* also were entitled to the benefit of the act of 1883. The claim so made was disallowed prior to judicial determination, by reason of the large amount involved, and because it was claimed in behalf of the Government that, both by the purpose of the act and by a fair interpretation of the words used, continuous service was excluded from its benefits; that if injustice was done, the remedy was in Congress and not in the courts. This court decided the question adversely to the Government in *United States* v. *Mullan* (123 U. S. R., 186).

It is decided in that case that if the first entry into the service was the last entry, then all officers who have entered the service are entitled to the benefit of the act of 1883, *supra*.

It is now claimed by appellee, that a pupil on entering the Naval Academy thereby enters the naval service, and is entitled to be credited under the provisions of said act with the time of his academic course. It is denied by the appellant that a pupil of the Academy entered the naval service.

If it should be held by this court that becoming a part of the naval establishment is an entry into the service, it is claimed that the period of pupilage is not "actual service" within the meaning of said act.

A naval cadet under the provisions of the act of 1882 (22 Stats. 285) is not in the regular Navy. After graduation he enters into "actual service," by appointment either in the line, the Marine, or Engineer Corps, or he is honorably discharged. The Court of Claims held in Harmon's case, lately decided, that no right of office vested in a pupil by virtue of his appointment, as an undergraduate, prior to the said act of 1882.

Whether *styled* midshipman or cadet midshipman prior to the act of 1882, they were in preparation for, not in, actual service.

In the mechanic arts an apprentice does not belong to the craft. Neither law, medical, nor theological students are lawyers, doctors, or ministers. Like students at the Naval Academy, they are undergraduates; their graduation is their "commencement."

The act of 1883, *supra*, is for the benefit of officers for "actual service" as officers or enlisted men; a student serves as neither; he is preparing himself to serve. He does not render service to, he is the recipient of favors from, the Government. If he is found worthy in charac-

ter and ability, he may after graduation commence his service, dependent on his graduating merit.

If an undergraduate should be regarded as technically an officer, he is an officer without command or right to a command. Like a law student in a moot court, he deals in hypothetical not actual cases. That the student receives $500 a year does not in any way indicate that sum is in payment for service rendered. It is in fact an allowance made for his support in his preparation for service to be rendered. It is a gratuity.

It does not follow that because the student holds his position by appointment he is therefore an officer. It requires a duly-authorized appointment to make a constitutional officer, but an appointment does not necessarily create an office. In regard to the Naval Academy, whether the appointee was styled midshipman, cadet midshipman, or naval cadet, it was a pupil, not an officer, appointed.

That the mode and manner of appointment was similar to that at West Point relates only as to the way in which appointments are made; the purposes to be effected are radically different.

This is not a parallel case with that of *United States* vs. *Morton* (112 U. S. R., 1). That related to the service of a military cadet at West Point.

> Morton, on the 1st of July, 1865, when he was admitted as a conditional cadet, entered into an agreement, as required by law, bearing that date and subscribed and sworn to by him, which stated that, "having been selected for" appointment as cadet in the Military Academy of the United States, he engaged, with the consent of his father, in the event of his receiving such appointment, that he would serve

> in the Army of the United States for eight years, unless sooner discharged by competent authority.

He also subscribed to the oath. Mr. Justice Blatchford says, in delivering the opinion of the court:

> An examination of the legislation of Congress shows that the cadets at West Point were always a part of the Army, and that service as a cadet was always actual service in the Army.

In support of the opinion a number of acts of Congress are cited to which this court is referred.

It is not conceded in the case at bar that at the present time or in 1867, when claimant received his appointment as a midshipman, that either midshipmen or cadet midshipmen could be regarded as either officers or enlisted men of the Navy. They were certainly not enlisted men; but even if this court should hold that they were whilst at the Academy petty officers, the very important question would remain as to whether they were in the naval service in the sense service is referred to in the act of 1883, *supra*.

The United States Naval Academy is at the present time, and has for a number of years past been, simply a school of instruction. In the first instance it was established by the Navy Department for the purpose of intructing midshipmen in mathematics, etc. Its original purpose was to employ such midshipmen as were on shore and to give them an opportunity to acquire an education. Until 1862 it depended for its existence upon naval regulations. Its pupils were naval officers. The school was, however, recognized by Congress in the naval appropriation act of March, 1847 (9 Stat. L., 169).

In 1852 an act was passed providing that no midship-

man, acting midshipman, or pupil at any naval school should be appointed unless recommended, etc., "in the same manner that cadets at West Point are now appointed" (Stat. L., vol. 10, p. 100). And see section 8, act July 14, 1862 (Stat. L., 12, p. 565), empowering the President to appoint annually ten acting midshipmen to the Naval Academy.

The Naval Academy received full Congressional recognition in an act approved July 16, 1862 (12 Stat. L., 583), which (*inter alia*) provides for the appointment of students at the Naval Academy who are to be *styled* midshipmen. After examination they shall be commissioned ensigns according to merit. A distinction was made, however, between those who were *styled* midshipmen and those who actually became so after graduation at the school by the first section of the act of March 3, 1865 (13 Stat. L., 539.)

By act of July 15, 1870 (1512, Rev. Stat.), the students in the Naval Academy are styled *cadet* midshipmen. The distinction before made as between midshipmen and acting midshipmen was recognized by Congress by act of July 28, 1866 (14 Stat. L., 322.)

Students after graduation are to take rank according to their merit (17 Stat. L., 555). The academic course is six years (17 Stat. L., 555). By the act of August 5, 1882 (22 Stat. L., 285), no cadet midshipmen or cadet engineers shall be appointed, but in lieu thereof "naval cadets. From those successfully completing the six years' course appointments shall hereafter be made, as it is necessary, to fill vacancies in the lower grades of the line and Engineer Corps of the Navy and the Marine Corps.

It can hardly be contended at this time, in view of the act of 1882, that "naval cadets" are officers of the regular Navy. They may become so by appointment after graduation.

They render, however, as much *service* now as they have at any time since 1862. Since 1862 they have been regarded as pupils or students, whether styled midshipmen, cadet midshipmen, or naval cadets.

The distinction between the students at West Point and at the Naval Academy is this: That by law West Point cadets are made part of the Army, whilst in the Naval Academy they are students, who may after graduation be appointed to the Navy.

Students in the Navy may be dismissed without court-martial, except for hazing, in which case court-martial is allowed by statute.

The question under the act of 1883 (*supra*) is one of *service;* not whether cadets belong to the naval establishment.

It is submitted that the judgment of the court below be reversed, with direction to dismiss the petition.

Respectfully,

A. H. GARLAND,
Attorney-General.
ROBERT A. HOWARD,
Assistant Attorney-General.
F. P. DEWEES,
Assistant Attorney.

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125-646

Supreme Court U. S.
FILED
MAR 31 1888
JAMES H. McKENNEY
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES
vs.
ASHER C. BAKER. } No. 1394.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF

JOHN PAUL JONES,
ROBERT B. LINES,
Counsel for appellee.

JUDD & DETWEILER, PRS., 420 7TH STREET, N. W.

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES
vs.
ASHER C. BAKER. } No. 1394.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

The appellee was, on the 30th of September, 1867, "by direction of the President * * appointed to the grade of midshipman in the United States Navy," and sent to the naval academy for instruction. After July 1, 1870, the form of appointment of students at the academy was changed, as to the portion above quoted, so as to read "appointed a cadet midshipman," etc., to conform to the provisions of section 12 of the Act of July 15, 1870, (16 Stats., 334,) directing "that the students in the naval academy shall hereafter be styled cadet midshipmen." No new appointment unthis act was issued to appellee. After graduation he was promoted to be an ensign (July 14, 1872); December 6, 1876, to master, and January 10, 1884, to his present grade of lieutenant.

In the court below appellee claimed to have his time at the academy credited to him in his grade of ensign, (the first in which the pay was graduated for length of service under 16 Stats., 330; R. S., 1556,) by reason of the following provision in the Naval Appropriation Act of March 3, 1883, which has several times been before this court for construction:

"And all officers of the Navy shall be credited with the actual time they may have served as *officers or enlisted men* in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service, in all respects in the same manner as if all said service had been continuous and in the regular Navy, in the lowest grade having graduated pay held by such officer since last entering the service; *Provided*, that nothing in this clause shall be so construed as to authorize any change in the dates of commission, or in the relative rank of such officers; *Provided*, further, that nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in the volunteer Army or Navy."

February 16, 1887, judgment was entered in his favor below, on the supposition that the case was covered by the opinion of this court in U. S. *vs.* Mullan, (123 U. S., 186,) wherein it was said that the appellee "had served as an officer in the regular Navy from September 1, 1860," the date of his appointment as acting midshipman. It being suggested, however, that credit for Mullan's time at the academy was not necessary to the result reached in that case, as it is in the case at bar, prayer for an appeal was entered. By consent of claimant this was withdrawn, the judgment vacated, and a new trial ordered. (Record, p. 2). The case being argued judgment was given a second time for the claimant, from which the appeal now pending was taken.

The court below held,—

First. That at the time of appellee's appointment a midshipman was an officer in the Navy, by virtue of legislative recognition as such in the Act of July 16, 1862, (12 Stats., 583,) Sec. 11 of which provided "that the students at the naval academy shall be styled midshipmen," and Sec. 1 of which enumerated them among the nine grades of line officers of the Navy.

Second. That "cadet midshipmen," which title was substituted for that of midshipman as applied to students at the academy, by section 12 of the Act of July 15, 1870, (16 Stats., 334,) were also in the Navy, though not enumerated as officers in the list of grades given in that act, section 3. This, on the ground of their recognition in the pay table of section 1556, R. S., and in the Act of June 23, 1874, (18 Stats., 203,) subjecting them to trial by court-martial.

Third. That the time at the academy was spent in "service," though passed mainly in receiving instruction, because it was paid for as "service" by the Government.

In addition to the reasons given by the learned court below, for its judgment, counsel for appellee submit the following:

I.

If the *status* of midshipmen and cadet midshipmen as officers in the Navy be regarded as depending upon their legislative recognition as such, without reference to any authority for their appointment, then the cases of U. S. *vs.* Hendee, decided at the current term, and U. S. *vs.* Moore, (95 U. S., 760,) are directly in point. In the Hendee case it was held that an officer was entitled to count for longevity pay, under the Act of 1883, the time of his service as paymaster's clerk, and in Moore's case a passed assistant surgeon was held to be an officer. The statutes are entirely silent, as to the manner of appointment of either a paymaster's clerk or a passed assistant surgeon.

The distinction between midshipmen and cadet midshipmen originated in the Act of March 3, 1865, (13 Stats., 539,) which increased the pay of midshipmen after graduation and before promotion to ensigns. This left the students in a sub-grade for pay, which

as above shown, received the name of cadet midshipmen in section 12 of the Act of 1870. The pay, however, was left as fixed in the Act of 1862. It is submitted that the new designation of a sub-grade of midshipmen in the Act of 1870, did not affect their classification as officers in the Act of 1862.

II.

But we think it can be shown that students at the naval academy, however styled, have always been officers of the Navy in a constitutional as well as in a legislative or popular sense.

When the academy was established by Secretary Bancroft, in 1845, by concentrating there some of the professors serving on board ship it was the midshipmen then in service who were sent there for instruction. (Reports Sec'y of the Navy, 1845, p. 3; 1846 and 1847, p. 13).

From the beginning midshipmen were, by law, styled officers, and required to be appointed by the President. (Acts March 27, 1794, and July 1, 1797, January 2, 1813, 1 Stats., 350 and 524; and 2 Stats., 789). The Act of April 21, 1806, (2 Stats., 390,) limited their number in time of peace to 150, but by Act of January 31, 1809, 2 Stats., 514,) the President was authorized to appoint 300 additional.

There can be no doubt that these were "inferior officers," whose appointments Congress, by law, had vested in the President.

Section 5 of the Act of March 3, 1845, (5 Stats., 794,) directed appointments of midshipmen to be made from the States and Territories in proportion to the number of representatives and delegates to Congress, and section 14 of the Act of August 3, 1848, (9 Stats., 272,) increasing the number of officers of the Navy of of the grade of midshipman to 464, directed their

appointments to be apportioned to the Congressional districts.

It had been customary, before the establishment of the school, to appoint midshipmen on probation, with a final appointment after a term of satisfactory service at sea, and this custom was continued thereafter, with an added term of probation at the academy.

(Soley's Hist. Naval Academy, pp. 72–73).

It seems that under their first appointments they were styled "acting midshipmen," but they are spoken of indifferently as such, and as "midshipmen" in the reports and estimates of the secretaries, and the numbers, including those at the academy and at sea, were kept within the legal limits. (Secy.'s Repts. 1851, pp. 13, 159; 1852, pp. 304, 456; 1853, pp. 303, 428; 1854, pp. 401, 444; 1855, pp. 9, 126; 1856, pp. 419, 583; 1857, pp. 582, 799; 1858, pp. 10, 538; 1859, pp. 1142, 1220; 1860, pp. 7, 220).

Section 1 of the Naval Appropriation Act of August 31, 1852, (10 Stats., 102,) provided that "hereafter no appointment of midshipman, acting midshipman, *or pupil at any naval school in the Navy*, shall be made unless recommended by the Member of Congress representing the district in which the applicant resides, *in the same manner that cadets at West Point are now appointed.*"

No portion of this act having been incorporated in the Revised Statutes it is still in force, except so far as it may have been modified by more recent legislation. If cadets at West Point were, in 1852, officers in a constitutional sense, then midshipmen, acting midshipmen, and pupils at the naval schools "in the navy" must be officers in the Navy in the same sense.

By Act of March 16, 1802, sections 26 and 27, (2 Stats., 137,) the President was authorized to "organize and establish" a corps of engineers, including ten cadets,

to be stationed at West Point, N. Y., and to constitute a military academy. The Act of April 29, 1812, section 3, (2 Stats., 721,) allowed 250 cadets to be appointed "by the President of the United States." And the Act of March 1, 1843, required the appointments to be apportioned among the Congressional districts.

That these two provisions of law, last quoted, now combined in section 1315, R. S., made of the Army cadets "inferior officers" in the constitutional sense was held by the Court of Claims in Babbit's case. (16 Ct. Cls., 202).

Let us examine the legislation since 1852, touching the students of the naval academy. Additional appointments from the District of Columbia, and a large and from enlisted boys, without recommendation by Members of Congress, were authorized to be made by the President by Acts of July 14, 1862, (12 Stats., 565, section 8,) and July 16, 1862, (Ib. 585, section 11).

The latter act and section, as stated in the opinion below, required all students to be styled midshipmen.

It also introduced a new scheme of appointment, viz: by the Secretary of the Navy in cases where the Member of Congress failed to recommend a candidate. This manner of appointment was followed for cadet engineers, when that grade was established by Act of July 4, 1864. (13 Stats., 393, Sec. 3).

The Revised Statutes, (Secs. 1514 and 1523,) repeat the provisions of the Act of 1862, as to the appointments by the Secretary of the Navy. In the case of U. S. *vs.* Perkins, (116 U. S. 484,) this court, referring to cadet engineers, and adopting the language of the Court of Claims said, "when thus appointed, they became officers and not employees."

As to the other appointees, the Revised Statutes are not so specific, speaking only of their "nomination" by the Secretary upon the recommendation of Members

of Congress. But read together with the unrepealed Act of 1852, (*supra*,) it is clear that they are constitutional officers, to be appointed by the President, upon the nomination of the Secretary, and recommendation of Members of Congress.

III.

As to the proposition advanced by appellants, that conceding students at the academy to be officers in the Navy, the time spent by them under instruction should not be counted as service, it may be said, that if that proposition is not completely disposed of in the opinion of the lower court, it must fall before the decisions of this court in U. S. vs. Morton, (112 U. S. 1,) and U. S. vs. Dunn, (120 U. S., 249).

In the former case the question was whether an army officer could count time passed at the military academy at West Point for longevity pay under a statute which said "the actual time of *service* in the Army or Navy, or both, shall be allowed all officers in computing their pay." The court held that undergoing instruction at West Point was performing service in the Army.

So in the Dunn case, one question was whether a boy apprenticed to learn music was performing service in the Navy within the meaning of the act now under consideration, and the court held that it was. So time passed, under instruction, at Annapolis must be regarded as service or duty.

It is to be noticed that in the case of naval students the appointment, in strict accordance with the Act of 1852, is to a *grade in the Navy*. It does not appear that the President is required by law to send these appointees to study at Annapolis, and that he might not order them to duty elsewhere. During the late war this was done, (Soley's Hist. Naval Academy, pp. 107, 108,) and so it would be if a war were now to

break out. But in time of peace one of the principal duties of a naval officer, of whatever grade, is to receive instruction, at the academy, on board practice ships, at gunnery or torpedo schools, or the naval war college.

The judgment below should, we submit, be affirmed.

JOHN PAUL JONES,
ROBERT B. LINES,
For appellee.